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MANUSCRIPT
CONN. LAW lectures
given
by Tapping Reeve
LITCHFIELD LAW SCHOOL

250
PER OZ

Nellie Chapman

Lex Mercatoria.

As delivered by Mr. Reeve

This as its ~~its~~ name designates is the law regulating commercial concerns, which is adopted in its general provisions by all commercial nations, qualified and modified ~~& modified and modified~~ by their various customs & ordinances. —

It has been termed the custom of merchants; but the word custom is not here used with legal propriety; for the mercantile law is general; it is not to be proved as particular customs are, but has within itself particular customs, which must be proved in the same manner as those at Com. law. —

It is not exclusively the custom of merchants, but regulates all mercantile matters; & it stands in the same relation, with regard to commercial concerns, as the Com. law does to all other transactions. —

The subjects of the Lex Mercatoria. —

Bills of Exchange are regulated by this law. - Foreign bills are always regulated by it in all countries; & Inland Bills are by the special ordinances of most Commercial countries regulated by it, as are promissory notes of certain description. —

Law Merchant.

Policies of Insurance, Charter Parties, Bottomry, & respondentia bonds, bill of lading, Laws of Navigation, & Pilotage are all Branches of the mercantile Law.—

The variance between the Com. Law & Mer. Law.—

1. At Com. law, choses in action were not assignable, so as to vest the property in the assignee, & such assignment was a species of offence, termed maintenance. But Courts of Equity in Eng. soon began to infringe on a rule, which it was found difficult to preserve in a commercial country. & compelled the debtor to pay the money to the assignee. — Since that this has been collaterally recognized by courts of law, tho' they still retain the form of bringing the action in the name of the original obligee: A promise by the debtor to pay the note to the assignee, is holden good at law. So also, they have in certain cases made an assigned note a set off, to a claim but by the obligor agst. the assignee. — So that all remaining of the old Com. law rule is, the formality of bringing the action, in the name of the original obligee. —

But by the law Merchant, such negotiable notes as are within its cognizance, are vested immediately in the assignee, both as to the legal & equitable interest, and without any privity of Contract, the L. Mr. raises an agreement between the drawer, drawee, the payee & the person holding the note.—

II. Again: at Com. law, that species of contracts termed

specialties, are so privileged, that no enquiry can be gone into, to prove the want of consideration. —

By the law Merchant, all negotiable instruments often having been negotiated, are equally privileged, as specialties, but before they are negotiable they stand on exactly the same ground as other instruments at com. law. —

III. Again some Mercantile contracts are valid, when there is no legal consideration, but merely that of honor: for instance, A draws a bill on C in favor of B. C refuses to accept it, B an old acquaintance standing by, honors it voluntarily, without any consideration actual or presumed, now by the law Merchant, B may maintain his action against A for the amount of the bill, thus accepted, notwithstanding there is no privity of contract between them. —

IV. — Again. By the com. law of Eng. fraud in the consideration of a contract does not render it void, tho. the party injured has his remedy, in damages, but a fraud in the execution always nullifies contracts. —

The Mercantile law destroys a contract, altogether, for a fraud, however minute in the consideration. It requires an uprightness of honesty, such as the keenest moral sense of the most delicate integrity would dictate, if the least trick, equivocation, deceit, or concealment of facts, destroys the contract forever. This however cannot extend to private speculative opinions or surmises. —

In commentary by the rule of com. law,

when the fraud is complete, even in the consideration it renders the contract void.

V. Again. At Com. law, if execution is obtained on a judgment against more than one, & one party be liberated from confinement, or otherwise discharged, this is a discharge to all, without a satisfaction & often without a rational presumption of payment altho' the law proceeds upon the ground of a presumed satisfaction.—

3 Mks. 18. Bl. R. 1235. 1 Viner. 115.

But by the Mercantile law, a discharge of one does not at all exonerate the remaining debtors.

VI. Again. By a general rule of the Com. law, contracts by which property is agreed to be transferred, & a consideration paid for it, are considered as executed, & the property vested.—

But by the L. Mer. if property be bought by one, & payment made by note or Book charges, yet if the person of whom the goods were bought, discover that the purchaser was a bankrupt, or even in failing circumstances, he may stop the goods in transitu & take them back into his own possession.—

VII. Com. Law matters are reckoned as lunar months. by the Mer. L. as Calender Months.—

VIII. Again. An instrument at Com. law, to commence its operation from the date, would include the day on which it is made, but if from the day of the date, exclude it.— The law Merchant excludes it in both cases

1 Ray 281. Stra. 829.

IX. The law Merchant does not at all recognize the just ancienti of Joint tenancy.—

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Of Bills of Exchange.

A bill of Exchange has been defined to be an open letter from one person to another, requesting him to pay a sum of money to a third person, or his order. —

There are three ~~persons~~ characters concerned in a bill of exchange

1. The drawer, who makes the bill. —
2. The payee, being the person in whose favor it is drawn. —
3. The Drawee, or person to whom it is directed, & by whom it is to be paid. —

A bill of Exchange in the hands of the Payee answers the purpose of money, for he may assign or indorse it over, which, instanter vests the property in the Indorsee. —

The Indorsee of a bill may indorse it, his indorsee may also indorse it & so on indefinitely. —

Every indorser is quasi a Drawer, & subject to the same liabilities as the Drawer. —

If a Drawee refused to accept a bill, or having accepted to pay it, the Indorsee must sue the Drawer or any one of the Indorsers or all at his election. —

The last person to whom the bill was negotiated is termed the holder. —

These bills often having been once endorsed need not altho they may be indefinitely transferred, but if the bill after such indorsement, be ever so often transferred no one

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can be sued on the Law Merchant except those who are parties to the bill on the face of it.—

Those bills payable to Bearer, or to A or Bearer may ~~be~~ always be transferred without indorsement, & when transferred by delivery they are as fully the property of the transferee as if they had been indorsed.—

The Law Merchant throughout proceeds upon the ~~ground~~ presumption that the Drawee has effects in his hands of the Drawer's to the amount of the sum mentioned in the bill. A bill of exchange is never received as payment, until the amount is actually paid. Where a man purchases a bill, it is not as if he purchases an horse, for if the bill is lost in the hands of the Payee, the Drawer becomes his debtor to the amount of it.—

Stat. 4 & 5 Ann. Camp. 9:10 Camp. 17.

Promissory Notes payable to G. S. or order are by the Statute 4 & 5 Ann. placed on the footing of bills of Exchange. The distinction between bills of Exchange & Notes of hand, is sometimes difficult of perception.—

The word "Drawer" of a Note, & "Drawer" of a bill of exchange are sometimes ignorantly used as synonymous, but they mean very different things, for the drawer of a Note is exactly on the same footing as an acceptor of a bill of Exch. The word ~~recently used~~ "Maker" of a Note recently used, avoids this confusion.

Checks or draughts on bankers are regulated by the L. M. These are ~~—~~ payable to Bearer & always on demand, but of these & promissory Notes, Mus ultra.—

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Bills of Exch. are drawn various ways, sometimes, say, on at sight, sometimes at a certain period after sight, & sometimes so many after date.—

The term Usance made use of by Merchants has been construed into various meanings, so that extreme seems to require that it be expunged.— The term is applied to the time in which a bill is to be paid, and the time is regulated by the various customs of different places. In Eng. & this country bills made payable at usance are payable within one month. Sometimes bills are made payable at double usance.—

It is a general usage of Merchants, to allow some days after the expiration of the time at which the bill is to be paid, or offered for payment— These are termed "days of grace". In almost all Countries three days are allowed.—

When a bill is payable at sight, no days of grace are allowed, altho' more requisite than in any other case.

Inland bills of Exch. were not at all governed by the law Merchant, until by an Eng. Stat. (the provisions of which have been copied by most of the States in the Union) they were placed on the same footing as foreign bills of Exch.

Bills of Exch. between persons of the same State are not it seems governed by the Mercantile Law, tho' bills between different States undoubtedly are.—

It has been much disputed in Eng. whether promissory notes made payable to J.S. or order were negotiable at Com. law, i.e. whether the Maker of such a note, promises to

pay any one appointed by the Payee & as soon as he appoints.—

The Prince believes this to be clearly the case at Com. Law, but on account of the great dispute, they were expressly made negotiable by the Stat. of Ann. & so soon as the Note is passed from the payee to another person, there is a debt immediately created between the drawer & such person.—

1 Salk. 129.
Ld Raym. 757.

Who may draw Bills of Exch.

Any person able to make any valid special contract may draw bills of Exch. & bind themselves thereby.—

1 T.R. 40.
Cowth. 82.
2 Vent. 292.
2 Show. 501.
2 Burr. 676.

Infants may bind themselves for necessaries, but not by Bond or Bill of Exch.—

But if an infant give a bill which is negotiable, the person negotiating it is as much bound, as if it had been given by an adult.—

2 Show. 8.
10 Mod. 186.
1 Bl. R. 485.
3 Burr. 1516.

Note payable to the order of J.S. is as much negotiable as if were payable to J.S. or order. So of a bill. A bill payable to Bearer is clearly negotiable.—

When there are Merchants forming a Company, the act of one binds the rest in all commercial concerns. It was formerly a question whether one partner could bind the other or others, by drawing or accepting a bill of Exch. The transactions in which bills of Exch. are used have been determined to be commercial, therefore when one of the partners draws or accepts a bill of Exch. in the name

of the firm, it will be always binding on all. —

But in cases of making title, or in any transactions not commercial, one partner cannot bind another or other partners, altho' he does it in the name of the firm — unless by special power given him by the other partners. —

Suppose however it was a man's own individual commercial concern, his separate interest, & he being a partner should either draw or accept a bill, would bind the company? It was at first determined that it would not, but now, even if it be a separate individual concern, other persons not knowing it to be so, it will bind the company for they holding themselves out to be a firm for very many purposes, it would be hard that strangers should be deceived by finding the responsibility to be attached to one person only, when they supposed it to belong to the firm. —

2 Burr. 277. Esp. 524.

Suppose a bill of Exch. was drawn by a person employed by several persons as a Factor, those only who assign the bill will be liable or bound by the act of the Factor; but if a banking having joint-interest, authorize a man as their factor, if he draws a bill of Exch. they will certainly be bound.

Salk. 126. 2 Ray. 175.

It is not necessary that a Merchant sign a bill himself to render him liable. — A signing by his Clerk who has been in the habit of doing business of this kind for his employer is sufficient. —

2 Ray. 209. Crawes 462.

The next case to be considered where A & B, not Merchants draw a bill on C in favor of themselves, payable

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to their own order. — & such is the bill if A one of the drawers indorses the bill to B another of the drawers, — Is this bill well endorsed so that C can be sued upon it, A & B not being partners? Yes should both endorse to render it good, that is, the endorsement good? — Lord Mansfield let in Merchants to prove the custom; altho' it was governed by the general law, & therefore not required to be proved, if the Jury found it not properly indorsed. — Mr Preene cannot reconcile this proceeding of L. Mansfield with the rule that the L. M. can never be proved by Merchants let in as Witnesses, & appears that this did not depend upon special custom. For where a particular custom challenged, proof is always admissible to prove the custom, & the case will be governed by it. —

Dun. 1210. 1221.

The fact was that L. Mansfield tho' a great genius & very learned man, was not a technical man, & often transgressed the boundaries of technical propriety to give place to substantial Justice. — His Lordship in this case did not know the general custom.

Bills of Exch. (as has been observed) are privileged as specialties. They have also the peculiar quality of vesting the property immediately in the transferee. —

1 Bl. R. 445. 487. 2 Ray. 75-8. 3 Wils 313.

The properties or qualities of Bills of Exch. & Prom. Nts.

Every letter of request from one man to another, desiring him to do a particular thing is not a Bill of Exch. tho' it might be a valid contract, for,

1. The 1st quality of a bill of Exch. is, that it is always

2 Stra. 1271.

for money, & never for any collateral thing. —

2. It must carry a personal credit with it, not depending
10 Mod. 294. 316. on any particular fund or Bank, for when a man sends
1 Str. 591 Dougl. 361. another a letter to pay a sum out of any particular fund
3 Wils. 307. or Bank, this tho' a good contract between the parties is not
2 Bl. 782 1 Str. 212. a bill of Exch.; for it does not make the Drawee answerable generally. —

A Bill of Exch. may operate to be payment out of a particular fund, & yet the Drawee to be liable generally. as a bill dated March 7 in the words "please to pay £50 of my
Dougl. 481. half pay in one month which will be due next Sept. — Now by the half pay here nothing can be intended but to inform the Drawee how he will get paid, & it is but a request to pay the payee £50. —

It is remarkable there is not a single instance in which notes of hand, whether payable out of a particular fund or
Dougl. 545. otherwise are not considered as negotiable. The reason of the distinction between Notes & bills, Mr Reeve cannot easily perceive. —

2 Str. 1151. 3 Wils. 213. 3. A third quality of bills & notes is that they must be paid
2 Roy. 242. Dougl. 362. at all events, not depending on any contingency whatever.
1 Ld Raym. 1396. 8 Mod. 363 Dougl. 563. 1 Burr. 323. —

There is another set of cases in which there is a certainty,
1 Str. 1217 that the contingency or contingencies will happen, but an un-
Burr. 217. certainty with respect to the time, at which they will happen.

Of this kind there are no cases of bills of Exch. to be found,

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But there are many cases of Notes in this predicament which are allowed to be good, as a promise to pay so much money on the death of A. —

1 Wils 262. "It is not necessary that the certainty should
Str 24 &c. be a physical certainty, a moral certainty will be
2 Bl. 1072. sufficient to render the bill or note negotiable." — These
5 T. Rep 85 are the words of J. Reeve —
1 Ch 239.

In all the cases before mentioned, the contracts would be good as between the parties, but not being negotiable would not partake of the qualities & nature of Bills & Exch. or promissory notes. —

Much has been said in the books as to the necessity
Str 212. of the words "value received" in bills & notes. It is certain that
3 Wils 207.
3 Mod 267. they are generally used, but not that they are absolutely ne-
1 Show 5. 497. cessary. There has been many obiter opinions that they
2 Wils 353 are not necessary in bills or notes which are negotiable Instruments to, but for as soon as they are transferred they have every quality of specialties, & therefore a consideration will always be presumed, & never suffered to be gone into.
2 Hardw. 25. There has been one* case in which the words have been decided not to be necessary. —

Chitty says that they are not necessary to be inserted, but that it is best to insert them, for otherwise damages cannot be recovered if the bill is not accepted, or if accepted & not paid. —

2 Wils 353 It is to the word "order" recommended from determinations
Cowper 288 &c. — Yorke, — Hale & Comnt it is necessary & J. Reeve thinks

the word "order" a constituent part of a bill of Exch. otherwise their negotiability would be defeated, if there were be mere letters of request between the parties. —

Before a bill of Exch. is negotiable the want of consideration may be enquired into, as between the parties, but after assignment this enquiry is forever precluded, for as has been remarked, an assignment gives to a bill of Exch. all the privileges of a specialty. —

Sta. 674. Esp. cas. 61. 117. 2 Ed. Ray. 91.

It is entirely immaterial whether the Indorsee knew that there was no consideration between the parties or not, in either case the bill is good in his hands. —

Doug. rep. Russel vs Langstaff 3 Ed. Ray. 183. 183.

Of Illegal Consideration. —

At Com. Law the illegality or turpitude of a consideration is a matter open to enquiry. In these mercantile transactions the law is somewhat different, for in some cases the illegality does, & in others it does not affect the bill in the hands of the holder. —

Ordinarily that which is at Com. law an illegal consideration does not affect the bill in the hands of the holder, if he be an innocent bona fide holder. —

3 Ed. Ray. 454. Camp. 341. Doug. 636. 644.

But where the holder knows the consideration to be illegal between the parties at the time of receiving the bill, he is particeps criminis & not an innocent holder, & the security is not good in his hands. —

1 Bl. rep. 445. 6 Ed. Ray. 61. Esp. cas. 166.

If however he transfer it to an innocent, & bona fide purchaser, the reason of the rule ceases & cessante

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ratione cessat ipsa lex.—

But where these specialties have by Statute been declared to be "void to all intents & purposes," as in some instances they have, the Court have as the less of two evils chosen to comply with the requisition of the Statute & rendered them void in the hands of innocent holders as in cases of gaming & insurance contracts.

Doug. 234.
Law vs Wal.
Ka. 155.
Doug. 768.

But the Indorsor may sue his indorser on a new note, or he may recover at Com. Law, provided the note was not illegal when it was given altho it may be so when it is sued. See Comp 341.

Of the State of the parties & st. of the acceptor, and the doctrine of acceptance.—

Under this head the doctrine of promissory notes cannot properly be considered, for the Maker of a Note is also the acceptor.—

The acceptance is an engagement to pay the bill to the holder.—

A man who previously engages to accept a bill on its being presented, does by such engagement actually accept it. See East. 103. where the rule is limited to cases where credit is given by a third person upon the faith of such an assurance.—

10 Mk. 715.
Beawes. 466.
2 Burr. 1663.

* It may either be before or after it becomes due

Salk. 127.
Ka. 364.
1 Str. 574
3 N.P. 270.

The most usual mode of acceptance is according to the tenor of the bill; but this is not universal.—

x Hardw. 74.
Ka. 1000.
10 Mk. 715.

x It may be by writing on it or may be by parol, in both which cases it is good both as to foreign & inland bills.—

must be (when established) compulsory. And so
58.
3 Co. 77. must General customs in order to be binding
7th, 1 customs must be consistent with each other.
and hence two contradictory customs will destroy each
other. – If a party intends to reject any custom
pleaded by the other, he ought to deny its existence. For if he admits its existence and then
relies upon another inconsistent with it, this rule
abrogates both and it would be attended with a
manifest absurdity

"—" Constructions of Customs "—"

Those customs which are in derogation of the
Common Law are to be construed strictly, and
[illegible]ver extended to other cases of a similar
[illegible]ture. – Thus by the custom of Gavelkind
[illegible] Tenant, an Infant may convey all his
[illegible]tate

if he buys land in Kent, it descends according to the common Law of the realm & not according to the particular custom of Kent.

III Of Particular Laws which are by

1 Bla. 67. 77. 80, 2

customs observed only in certain Courts & Jurisdictions. These are generally in Great Britain the civil and canon Laws of Rom

They differ from particular customs which have local usages, as those have merely a local jurisdiction. These derive all their in Great Britain from their adoption, and not from any intrinsic efficacy in their

This adoption may have been by in usage, or by act of Parliament. — In case they cease to be unwritten L are equally binding with any

itten La

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On the ground of, & the Statute of Frauds & Perjuries
Sto. 648. 3 Burr 1674. parol acceptance have been objected to, but ineffectual
1563. by, for the presumption of law is always that the
drawee has effects of the drawer in his hands. —

This acceptance need not necessarily be made to the holder, altho, it usually is, & to whomsoever it is made, it is obligatory on the acceptor, binding him to every previous indorsee & subsequent holder. —

So a letter from the drawee to the drawer that he
Beawes 454 will accept the bill, is a good acceptance; but there
Comp. 572. may be equitable circumstances which as between
574. the drawer & drawee may exonerate the latter. —
Doug. Ma. Sir. vs Hunt

A bill may be accepted in part in which
Sto. 214. case it is good pro tanto. It may be accepted payable
11 Mod. 190. at a different time from that mentioned in the bill,
Beawes. 481. & as has been observed, in many ways variant from the tenor, but in all these cases it is at the option of the holder to receive such acceptance or resort to ~~the~~ his remedy against the Drawer or previous indorsees if any. —

A conditional acceptance, when the condi-
1 Ld Ray 182. tions are complied with, is binding on the acceptor. —
Comp. 574
Sto. 648.
1152.
2 Wils. 9.

What constitutes an Acceptance. —

Almost any thing which can import an acceptance
Sto. 648. will bind the Drawee, as writing "Seen" or "presented"
Gilb. L. Ev. 18. on the bill. So also when it was said "leave it with me

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& I will accept it, it was holden a good acceptance. So also a direction by the drawee to a third person to pay the bill has been holden a good acceptance.—

B. N. P. 270.

An acceptance is an engagement not only to pay the holder, but any subsequent indorsee.—

The drawer if rendered liable by a subsequent protest, may recover from the drawee, if at the time of drawing the bill he had in his hands sufficient of the drawer's effects to discharge the bill.—

An acceptance bettens the situation of the holder by giving him an additional security.—

Of the negotiation of Bills of Exch. & Notes.

If made payable "to Bearer," a bill may be transferred by delivery; but if "to order" it must be by indorsement. These indorsements are ordinarily Blank indorsements, such a bill may pass by delivery, but if the blank be filled up, it must be again indorsed Blank, before it can pass by delivery.—

1 Ld Ray 575.
3 Ld Ray 80.
3 Burr. 1516.
1 Bl. rep. 485.
Laug. 611, 610.
or 633.
Russel vs Langstaffe 551.

Of Indorsements.

Whenever a bill or Note passes by delivery, & the party receiving it, is a stranger to the bill, on the face of it, he cannot in case of non-acceptance maintain his action agst the parties to the bill, by the Law merchant; but he may resort to his Com Law ~~action~~ remedy against the person transferring it to him.—

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The indorsee may at any time make himself a party to the bill, when the indorsement is blank, by filling it up with his own name. This may be done by the indorsee in two ways 1st by filling it up as being vested in himself. 2d: by filling, as a power of Attorney to himself, to receive the money of the indorser.

1 Show. 165
1 Salk. 128.
130.
2 Roy. 871.

In short any thing respecting the bill may be written over a blank indorsement.—

There is implied in the contract arising from a bill of Exch. an engagement not only to pay the payee of his endorsee, but every subsequent Indorsee.—

The Indorsee holds the bill with the same privileges against the Drawer as the payee did, together with an additional security agst. the payee, & in all cases, with the same privileges agst. the drawer as the Payee would have if there were a valuable consideration.—

It is laid down as an universal rule, that whenever the Indorsee has received a valuable consideration from the indorser, he cannot so indorse it as to restrain or prevent the Drawee from negotiating it.—

But when the Indorsee is only agent for the indorser, a restrictive indorsement may be made, so as to be payable to a certain designated person of him alone.

2 Burr. 1227.

The words "or order" are not necessary to be used in the indorsement to render bills or Notes negotiable to any extent; for the indorsee holds the bill with the privileges

Com. R. 311
1 Bl. R. 295
457.

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of the payee, & by the words "or order" in the bill, the Payee has a right to negotiate — Ergo

2 Burr. 1222 1216. Doug. 617. or. 639.

When the transfer is by delivery, the bona fide holder has a right to recover it of the drawer, tho' intermediately it was obtained by fraud, or theft. Law at Com. Law in every case except that of money, if a thief sell my property to a bona fide purchaser, I do not lose my right to it, for prior in tempore, potior est in jure. — The difference between money and collateral articles is made on a principle of policy, not to impede the circulation of the medium of the country. The law Mer. on the same ground extends this exemption to bills of Exch. & also to a Common draught on one's private Banker.

1 Burr. 452. or 471. 1 Bl. R. 485. Doug. Rep. Peacock vs Rhodes.

When two or more partners are joint payees, an Indorsement by one is binding on all, but when a bill is mad. payable to two or more persons who are not partners quoad hoc, it is said to be determined, that to convey the property all must indorse. —

Doug. Rep. appendix

Same persons are under certain circumstances empowered by law to endorse — As when a feme sole who is a Payee marries, her husband may endorse without her. —

Sha. 516.

So the assignees of a bankrupt may endorse.

So also may executors of a last will and testament. 2 Show. 509.

Lawes. 469.

So a trustee may endorse for the cestui que trust.

2. Wils. 1. Exch. 5. Sa. 1. 416.

A bill cannot be so divided by partial in-

dorsements as to render the Drawer liable in more than one action. —

Neither can it be so divided as to subject the acceptor in more than one suit, unless when accepted it was previously indorsed over in parcels; But if it were endorsed over in parcels, he is liable in as many actions as there were separate endorsements. —

Beawes. 266.

If the drawee pays a part of the bill, & it is endorsed over for the remainder, the Drawer is liable in one suit only. —

Let us now resort to the engagement of the drawer. The Drawer engages, first, to the payee that the Drawee is capable of binding himself. 2d That he is to be found at the place where he is described to be. 3d That he will accept the bill, & that the Drawee will pay, & in default of any of these, he becomes liable to the Payee & his endorsees in infinitum, they performing the requisite duties on their part. —

Beawes 469.

In case of non acceptance, he is also liable for the interest on the Bill, & the damages resulting to the holder &c from the non payment. —

The damages allowed differ according to the variant customs of the mercantile Law in different places. Before the revolution 20 p.c. lent on the amount of the bill was recoverable over all the Colonies, in cases of bills between America & Eng. but different customs have now grown up in different parts of the Union. —

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A man may render himself liable without actually drawing a bill, as where he writes his name
1 Bl. 313. blank on a piece of paper, & delivers it to a third person with power to draw a bill over it.—

Formerly it was disputed whether the drawer having become liable by the non acceptance of a bill, could
Str. 777. Eng. Ep. be sued before the bill became due.— It is now settled that the Drawers liability commences instanter on the non acceptance; one of his duties having failed of being performed.—

The Indorsee's Engagement.—

2 Show. 441. He is to all parties subsequent to himself quasi
494. a new Drawer, & liable to them equally with the new Drawer.—

Nothing will discharge the indorsee except what will discharge the Drawer viz the payment of the money, for an ineffectual Judgment against one of the Indorsers or the Drawer after the holder has made his election,
3 Mor. 86. is no satisfaction.— This principle is unknown to the Com. law.—

Even an ineffectual Execution which does not
2 Bl. 1235 raise the money is not a satisfaction by the Lex Mercatoria, tho' by the Com. Law it is, & by the Law Merch. a discharge of one taken on an Execution is no discharge to the rest, contrary to the rule of the Com. law. & by

the L. M. the same person may be retaken after having been discharged. —

The Holders Duty.

All the liabilities of the parties before mentioned proceed on the ground that the holders do their duty. —

A bill becoming due a certain time after sight, must be shewn to the Drawee within a reasonable time & without unnecessary delay, & if such delay intervenes & a consequent loss ensues, the negligent party must bear it. —

If payable at a certain time after date it is
1 Roy. 719. holden that the holder discharges his duty by presenting at such time, & on the day on which it falls due.

If on being presented it is refused to be honored by the Drawee, the holder must give notice to all those against whom he intends to proceed, & those parties not notified are not liable.

This notice must inform the party notified, that it is
1 Roy. 170. the holders intention to render him responsible. —

The reasons for giving notice

It is very important for the drawer to be notified, that he may adjust his accounts with the Drawee & obtain from him the property which the Law presumes him to have of the Drawer's, & also that he may make pro-

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vision for the payment of the ~~debt~~ bill.—

The Indorsers have all of them remedies against same person, they therefore must be notified that they may pursue their remedies and secure themselves.—

5 Burr 2670
1 Bl. R. 712.
Str. 442.
2 Burr 669.

If the Drawee accepts a bill variant from the tenor of it notice must be given to the Drawer & Indorsers as before.

Whether accepted or not, the holder must present the bill for payment, & this within the time at which it was to be paid, including the days of grace: for the law presumes that the Drawee will pay, or at least afford him a locus penitentia or an opportunity to pay.—

Td Ray 743
Str. 829.
441. 515.
649.
2 Bl. R. 747
Beawes 461.

The time of giving notice.

Notice of non acceptance of all foreign bills must be given by the ~~first post~~ & after ~~presentation~~ for payment by the first post afterwards, that it is not paid.—

Where there are no posts the first opportunity must be improved.

In Ireland bills the Queen supposes the same rule prevails. When the parties are near neighbours the first opportunity must be embraced.

1 T. R. 169.
167.

If the Drawee have no effects of the Drawer in his hands, the holder may sue the Drawer without notice.

1 B. R. 410.

Whether the holder has properly done his duty is a question of Law arising from the facts, & is to be tried by the Court. —

When there are no effects of the Drawer in the hands
15.R. 714. of the Drawee, altho' no notice is requisite to the Drawer; the Indorsers to made liable must be notified. —

The manner of giving notice. —

15.R.170. In Inland bills no particular form is necessary
3 Bac. 614 or requisite nor in promissory notes. —

In foreign bills the mode prescribed by the law must be precisely pursued, & any deviation from it destroys the claim of the holder. —

The holder calls upon the Drawee & presents the bill for acceptance: the Drawee refuses to accept it: he must then apply to a notary public, who takes the bill & carries it himself, & presents it to the Drawee, for acceptance. The Notary then minutes upon the bill, the time of his proceedings which is termed minuting the bill: he then draws up in his official capacity a solemn declaration, stating the facts as they happened, & this declaration is a protest for non acceptance. All this must
B.N.P. 271. be done within the regular hours for doing business. —

This protest thus made out, must be sent away by the next post to the party concerned & a copy or duplicate of it taken by the Notary & left in the possession

ion of the holder is the evidence on which he is to recover, & is admissible as such in all Courts of Justice. The holder can adduce no other evidence.—

After this at the ultimate period of the bill's being payable the holder must go to the Drawee again and demand payment, on the refusal of which the same formalities are again to be acted over, & a protest is to be obtained for non-payment.—

The bill itself together with the protest is then to be sent back to the Drawer by the first post & this is the necessary notice.— Beawes. 760.

A Copy of the bill taken by the Notary Public is sufficient on the protest for non acceptance.—

If the Drawee is incapable to contract a protest is made by a Notary in a similar manner.—

When the Drawee accepts variant from the terms of the bill, a protest for non acceptance must be entered & also for non payment, in case he will not pay the whole bill: but if the holder agree to accept of collateral articles in lieu of Cash no protest is necessary.—

If the holder have his bill accepted & suspect the Drawee to be in failing circumstances, he must for the benefit of the Drawer demand of the Drawee better security Beawes. 743 & on a refusal to find such security he must protest on that ground.—

Law Merchant. —
The effect of Notice. —

This has been in a great measure anticipated by what has already been observed. —

After the holder has complied with the requisitions of the Law, he is entitled to recover his money, the interest, his costs & damages. —

Beawes 461. Sta. 649.

At Com. Law damages are recoverable only for detention which is supplied by interest. —

Originally these damages by the L. M. were uncertain but the ascertaining them in such particular case, was a matter of so much perplexity, that a definite sum is now given, p.c. cent varying according to the customs of different places. —

There is one species of bills, which Mr Reeve has purposely avoided mentioning until now viz. Bills drawn to be accepted on the account of another person who is indebted to the Drawer: as if A in N. York draw in favor of B a bill of Exch. on C. in London on the account of D in London who is indebted to A. In this case no contract is raised between the drawer & drawee: It is in fact a bill drawn to be accepted on a certain condition which the drawee at his option may accept or refuse.

But any man whatsoever may accept a bill in honor of the Drawer, in which case a contract is raised between the Drawer & ~~drawee~~ acceptor: So also any person may accept on account of any or all of

Beawes 456.

the Indorsees.

When a third person accepts in honor of the drawer or indorser, on refusal of the Drawee, the holder gets it protested & the acceptor goes also before a Notary Public & ~~subscribes~~ describes a declaration in writing that he accepts it in honor of the Drawer or
1006.457. Indorser, to whom all these proceedings are sent & the notice thereby given, raises a contract between the acceptor & the Drawer. —

If the acceptor has in the interim received from the Drawer any assurance of his acquiescence in the acceptance, ~~he may pay it~~, he may pay it without giving notice to the Drawer, otherwise he must give notice pro forma scripta. — Idem when accepted in honor of the Indorser. —

The presumption of law is that the acceptor
1 Wils. 185. is indebted to the Drawer, until this presumption is removed therefore, he is liable to the Drawer for not paying a bill which he has accepted. —

If the Drawee pays the bill having no effects of the Drawer in his hands, the latter certainly becomes his debtor, & he may of course recover. But is his remedy
1 Ray 269. by the mercantile law? Or must he resort to his Com. Law remedy. Mr Reeve is inclined to his Com. Law remedy, altho' he has seen ~~altho~~ no decided cases to this point. — Sed tamen quere. —

It is a general rule of the L. Mr., that an accep-

tance once made can never be revoked. Beaw. 464.-

The holder however may discharge the acceptance not only by writing, of which no doubt could exist, but also by parol declarations or acts equivalent to such declaration. - Doug. Walpole vs Pulteney. Bingwall v Dunster.

Doug. R. Blackhs vs Peel.-

No length of time shor of statute limitations discharges the acceptor of a bill, nor does a receipt from the Drawee, Payee, or any Indorsee of part of the amount of the bill discharge him from his liability to pay the remainder.

A written promise on the bill by the Drawee that he will pay it, only adds a some saw security to that already existing by the L. M. but does not at all exonerate the Drawer. -

Doug. R. Ellis vs Galendo.

The principle of the Lex loci govern in bill of Exch.

Stha. 733.

When the bill is accepted variant from the tenor of it (as for part of the sum) the holder may receive such part, as the Drawee will pay for the benefit of the Drawer, but must protest the bill for the whole. —

D Roy 744. Stha 745. B.N.P. 271.

A receipt of part of the money from an indorser, does not discharge the Drawer says Mr Reeve. -

Re. Does not a receipt of part from the Drawee, discharge the liability of the first indorsee & all those previous to the holder, & does not the same rule apply mutatis mutandis to the case above

Formerly it was holden that the Drawer must be resorted to before the Indorsor could be sued, but this rule tho' attended with convenience of avoiding circuity

Doug. Walpole vs Pulteney Bingwall vs Dunster.

ity of actions, is now explode.—

A receipt of part of the money from the maker
Sha. 745. of a promissory note discharges the Indorser.—

Of the Remedies.

When a privity of contract exists between the parties, the Com. Law remedy may be resorted to as Ind. Afs. Debt &c.

But the L. M. gives a special action on
3 Bar. 614. the case founded on the Custom of Merchants & unknown to the Com. Law pleadings.—

Formerly in setting out the custom, it was usual
12 Mod 21 175. to begin by depening precisely what the custom was, mentioning its particular provisions, & then to bring the case within it; but now as the custom is under-
Wils. 189. 129. stood not to stand on the ground of a Com. Law custom, it is usual only to allude to it, but not as formerly to give its provisions in detail.—

To give a right of recovery the case must be stated with all its circumstances of ~~no~~ protest, notice &c.—

In all cases, the following circumstances must be stated: That the drawer made ~~the~~ his bill of Exch.: directed it to the drawee, requesting him to pay the payee or order a certain sum, & that the bill was delivered from the Drawer to the Payee.—

In time of which it was not necessary

be stated, altho' it may be useful to state it in particular cases as in his pleas on the Statute of Limitations.

The drawing of the bill by the maker of it need not be stated. Suppose the suit is to be brought against the acceptor by the Payee, over and above what is mentioned as necessary above, an acceptance must be stated, which implies a presentation. —

2 Show. 180. 4 Q. B. Ray 364. 1 Stra. 542. 13 Ves. 6. 2 Stra. 817. 1 Wils. 185

The manner of acceptance need not be stated; a contrary to the general principle of the Com. law which requires a statement of the quomodo, as well as the quia. Douglass — Ashton vs Aspinwall —

It may not be amiss to remark here, tho' rather digressive, that evidence of acceptance after time of payment is good. —

If the Indorsee bring the action against the acceptor, this more is necessary to be said; that an indorsement was made. —

If the Indorsements intermediately, supposing any, between the Payee & indorsee were Blank, the Indorsee may declare the Indorsement to have been immediately from the payee to himself. If they are filled up they must be stated in form & in order. —

An Indorsement implies a written assignment & delivery, which therefore by the L. Mer. need not be specially stated. —

If a Bill is made payable to bearer, it is unnecessary to state any indorsement, unless there having

~~an~~ been an actual indorsement, you wish to sue the Indorser. —

[illegible] it is an indorsee who has a right to bill against the drawer, it must be averred & stated that he has had the money to pay, in consequence of ~~which~~ the bill's not having been paid. —

The Reason is of Common Law that it is not necessary to state a promise to pay in the Deft. but merely the facts which render him liable ex qu.; the delivery of the bill is averred, & the bill imports a promise. —

Ld. Ray. 538.
1 Salk. 128.
Carth. 409.

It is now an established principle that an Indorsee or Payee may pursue all his remedies at once, he may have suits against the Drawer, acceptor, & all his Indorsers at the same time; He may recover Judgment & take out Execution against all, & tho' on a Com. Law principle, as well as a principle of Equity, he can recover but one satisfaction, yet he may recover Costs against each.

Ld. R. 749.
1235
2 Ves. 115.
1 Sta. 515.

Suppose when all are sued one chooses to put a complete stop to the proceedings, he must pay the debt and all the Costs in all the actions; but if he pays the debt & his own Costs, it stops further proceedings against him, & the other parties by tendering each respectively his own Costs, & pleading full payment by the party aforesaid may stop the proceedings. —

If however Judgment proceed against all & against each for the whole sum, yet the Plt can take ~~out~~ but one satisfaction & the Cost from the other parties, & if he do take

more than due satisfaction he is punishable for a contempt of Court.—

So if the parties after Judgment tender the debt & all the Costs, the taking out Execution is a contempt.—

What must be proved.—

All the necessary allegata which have before been mentioned must be proved.

The acceptance itself is evidence of the bills being the act & deed of the Drawer, & the acceptor cannot allege it be a forgery; of course in an action against the accept. the handwriting of the Drawer need not be proved.—

1 B. Rep. 444. Str. 945. Burr. 1354. 1 B.L.R. 390. 1 B.R. 654. or,

But if the acceptor honored the bill without seeing it, the rule does not hold, for cessante ratione cessat ipsa lex.—

The acceptors handwriting, when the acceptance is in writing, is the proof of the acceptance ~~of the~~ in other case it may be proved by parol.—

If the action is brought against the acceptor by the holder of a Bill payable to order, the handwriting of the Indorsor must also be proved, for the acceptance does not go to prove the handwriting of the Indorsor.—

When there are several Blank indorsements, the handwriting of the first Indorsor only, need be proved, but if the ~~handwriting~~ indorsements are filled up the hand of each Indorsor must be proved.—

1 Ld. Ray. 742. ante

Law Merchant.

When the acceptance was upon condition, the condition must be proved to have happened.—

In an action brought by the Indorsee against the Drawer, on a non-payment of the Drawee, the hand writing of the Drawer & payee, who is the original indorser, must be proved. This is sufficient unless there are intermediate special indorsements, in which case as has been observed, the hand writing of each individual special indorser must be proved.—

If the bill is payable to A or Bearer, no Indorser's hand need be proved, nor the hand writing of any person but A.— If to Bearer, no Indorsers hand need be proved.—

In an action Indorsee vs Indorser, it is sufficient
1 Dr. 174 to prove the handwriting of the Indorser, who is quasi a
744. new drawer, & neither the original Drawer's hand
1 Burr 675. writing, nor that of the intermediate blank indorsers
Sho. 479. need be proved, but the handwriting of all intermediate special indorsers must be proved.—

In an action Drawer vs acceptor. The drawer must
10 Mod 37. prove the acceptance, (by the handwriting of the accept-
1 Ld Ra. 89. -or) & demand of payment, & shew that it was not paid,
1 Ld Ra. 185. by the ordinary evidence of a return of the bill with a protest.—

It is not necessary to prove that there were effects of the Drawer in the possession of the Drawee, for the law presumes this; & the onus probandi is on the drawee.

Suppose the action is brought by an Indorser who as yet has not been damnified, but notified & consequently has himself paid it (I use the words of Mr Reeve) he must prove that the money was paid. —

2 R. 741.

In the case above it has been decided, that the technical Com. Law payment by indorsement is sufficient. This decision certainly does not symmetrize with the principle of the Mercantile Law generally, & is disapproved of by Mr Reeve. —

3 Wils. 18.

Drawee vs Drawer: the drawee must prove that made the bill; & that he paid the money: having no effects of the drawer in his hands. —

A protest is prima facie evidence of itself, & requires nothing to substantiate it unless the other party attempt to prove it forgery, & even in this case it is not necessary to prove the handwriting of the Notary, but merely to prove a certificate from the Executive or proper officer to certify that J. S. is a Notary Public.

Gilb. L. Ev. 118.

When the Deft. has suffered a default, it is not necessary to prove the hand writing

3 J. R. 29. 30.

If a Note be proved to be merely an accommodation note, not given in consequence of any indebtedness, & when in course of circulation such note or bill returns to the Payee of the Note, or drawer of the bill, ~~he~~ as indorsee he cannot recover. —

1 H. Bl. 98. 10 Mod. 37. 1 Wils. 186.

Law Merchant.

Bank Notes.

Are substantially the same as bills, payable to
Bum 452. 460 Bearer tho' they are considered for most purposes as money. Buller Justice says, "this Court have never yet determined that a tender of bank notes, is at all events a legal tender, but if they have been offered, & no objection made on that account, this Court has considered it a good tender" & again, "We have always been inclined to consider them as money" — This rule could not ~~be~~ with propriety be adopted here in the present state of our banking system.
3 TR. 554.

Clerks Bankers or Goldsmiths Notes.

1 Bum 457. Are always accounted among Merchants as ready Cash. They are drawn on a certain description of persons termed Bankers, & made payable either to bearer, or to P.S., or order. A demand must be made immediately or within a reasonable time at the risque of the Holder.—
2 Mod 744.

If the Goldsmith, alias Banker, fail, he who delivers the note, in payment of a debt will not be charged, as the Drawer of a bill of Exch. would, but the receiver is supposed to give credit to the Banker, the note is regarded as ready money, payable immediately, & as it is optional with him to accept, or reject it, he takes it, if at all, on his peril.—
Kyd. 27. Hodgkinson v. Fary

But if the man to whom the note is given demands the money within a reasonable time, & the Banker or Golds-
1 Str. 1.

smith intends to pay it, this charges the giver of the note.

- A Goldsmith's Note indorsed is a bill of Exch - against the Indorser.

As to what shall be esteemed a reasonable time, the decisions seem to vary; it must at all events be very soon after the note is received. -

- A received a Goldsmith's Note at two O'clock P. M. & presented it at 9 the next morning, the bank had stopped payment 3/4 of an hour before, & this was held to be a reasonable time, & Mr Reeve says that it will always be time enough, provided that the presentation of the bill is not deferred till the afternoon. - The distinction taken in Shange 416 is not satisfactory to Mr. Reeve. -

Tho. 415. 550: 416 910. 1175. 1248.

Policies of Insurance.

- A policy of Insurance is a contract between A & B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. -

2 Bl. 462 Policy what.

What may be insured & who may Insure. -

The whole vessel whole cargo, & whole freight may be insured, or either or any part of them at the discretion of the owners & this against any casualty. -

Money on hand may also be insured. -

The benefit of policies is not confined to ~~navigation~~ navigation, nor exclusively to mercantile transactions

3 Burr. 1394.

for any property may be insured against any casualty — as lives, houses, & many contingent events. —

This kind of contract must be in writing, & the writing is termed a Policy; the Insurers are generally called the underwriters, & the sum given for Insurance the premium which is paid in advance. —

No exchange of premium can amount to Usury

Stat. 19th Geo. 2d c. 37.

It is a general rule that no person not interested in the thing insured shall recover upon the policy; There was formerly some doubt respecting this until it was settled by Statute. —

But Mr Reeve supposes the Statute to be merely in affirmance of the Com. Law; for it is entirely contrary to the whole tenor & spirit of the M. L. — It is no encouragement to commerce, & repugnant even to the genius of the Com. Law which discourages Gaming Wagering Policies therefore says Mr Reeve were not allowable even at Com. Law. — Double Insurances come under this description, & are allowable only under special circumstances as when the Insurer is insolvent or dead. —

2 Br. 661. 662. 665.

A wagering policy is then void, altho the stipulation of "Interest or no interest" be inserted; neither can property be insured for more than its value or more than the quantity of Interest had in it. 3 T. R. 663. —

Money lent on respondentia or bottomry bonds may be insured.

2 Bl. 458.

Bottomry is in the nature of a mortgage of a

ship when the owner takes up money to enable him to purchase his voyage, & pledges the bottom or keel of the vessel (pars pro toto) as a security for the repayment. — Here if the ship be lost the lender loses his money; if it returns in safety, he receives it again with the premium agreed upon. —

This originated from the power of the master
Molloy 361. to hypothecate the ship in a foreign country for the pur-
Malyne 131. pose of raising money to refit. In this case the ship & tackel as well as the person of the borrower are liable. — In respon-
Eno. J 208. dentia bonds, which differ from bottomry in this; that the merchandize & goods are bound & pledged for the
1 Sid. 27. repayment of the principal with the premium on the safe return of the ship, instead of the ship itself. —

Yet the lender of the money having the interest in
2 Saunders 200. the ship, may get it insured, signifying particularly
2 Burr 717. that the interest that he has in the ship, is money lent
3 Burr. 1394 at respondentia or bottomry. —

If property is overvalued to any unreasonable degree, & this can be proved, the policy may be avoided. It has
3 T.R. 663. been decided that East India bonds could be insured as money. —

If goods are insured they must be so under the denomina-
3 Burr 1394. tion of goods, & no other. —

A reassurance is a contract of indemnity made
2 T.R. 162. to 165. between the original & collateral insurer & is allowable only when there is an act of bankruptcy or death in

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Insured. This is by a Stat. provision 19 Geo. 2 c 37. Qu. is that considered as made in affirmance of the Comm. Law?

Nothing can be governed by the mercantile law of insurances, unless the thing insured be of a commercial nature. A Lot insured in the East indies was holden to come within the L. Mc. as being the property of Merchants. —

3 Burr. 1905.

The modes of Insurance.

The modes of Insurance are various, the most usual method is, for each insurer to subscribe individually as much as they chose, until the policy is filled, after which time additional subscriptions are void. —

1 Stra. 133

Sometimes vessels are insured lost, or not lost, by which is meant that if a vessel having been some time at sea unheard of, is insured, & after the date of such insurance is lost the underwriters are liable, or if lost before the date of the policy if the assured did not know it, the underwriters are liable, but if the words are general, & the words "lost or not lost are not inserted" & the vessel is actually lost before the date of the policy, the underwriters are not liable says Shower 324. —

1 Shaw. 324

2 Saunders 200

Vessels are sometimes insured at & from a certain place in which case the underwriters are liable for any loss or detention in port, unless such detention or loss

arise from the ~~a~~ negligence of the owner. But if the accident causing such loss or damage ought have been
2 Atk 359. seen & prevented by the exercise of due diligence in the owners, the underwriters are released. So also if the voyage is laid aside. —

If the ship and cargo are insured at & from, & before the cargo is put on board, the ship is lost, the underwriters are liable for the Ship only. —

If a vessel be insured from a place the liability commences from the time of setting sail. —

Insurance may be made against ~~every~~ any & every casualty — as the perils of the sea, Capture, mismanagement of the mariners or Capt. (who are generally concerned as the agents of the owners & for whose misconduct the ~~owners~~ Insurers are not liable unless by a special agreement) Thieves, which is construed to extend to pirates only & the

Insurances are sometimes made upon express con-
4 Mod. 60. dition, as that the vessel shall carry a certain number
Show. 326. of guns; shall depart with convoy & other things of a similar nature. Now in these cases if the condition is not complied with, the Insurers are not bound. —

In the case of convoy it is held not sufficient to depart
Salk 443 with the convoy only, but the convoy being bound to a differ-
Sha 1265. ent port, but the ~~convoy~~ voyage must be made in com-
Park. 339. pany with the convoy, unless unavoidable accident
2 H Bl. 551. separate them. —

In these cases it has been decid. that

The Insurers were liable for the vessel & property insured, from the time that it left the port, to that of its arrival at the usual place for taking convoy, contrary to the opinion of Holt.—

Salk. 443. & authorities ante.

If the ship is separated by some unavoidable accident from the convoy the underwriters are liable, otherwise if separated by any wilful default or negligence.—

4. Mod. 60. 3 Lev. 326.

If the vessel does not depart with convoy, the insurers are to restore the premium, for there is no risque run.— But suppose a vessel is necessitated to go from one port to another to meet the convoy, & before she had arrived the convoy had sailed, here shall the premium be returned? the general rule is that the Insurers shall keep the premium, if the voyage has commenced, but shall the whole premium be returned in this case where the risque is so small? This is still unsettled— It would be endless to particular all the various modes of Insurance, indeed two insurances rarely agree in all particulars— Let us then proceed to consider what discharges the parties.—

3 Burr. 1237.

What discharges the Parties.—

This has been in a considerable degree anticipated by what has been mentioned under the preceding heads. Fraud in any shape whatever will entirely destroy a contract under the mercantile law. Any false averment of a fact, any misrepresentation or concealment of facts, which if known might tend to operate upon

Sta. 118 & 113 B.

the minds of the Insurers, so as to induce them to enhance the premium, & any collusion to induce the underwriters, will certainly vitiate & nullify the contract.—

3 Burr. 1361.

If the fact not mentioned were one of general & public notoriety, such as one as the underwriters must be supposed to know, such as a declaration of war, the omission to mention it, will not vitiate the insurance.—

Ex. 1905 to 1912

Neither is it necessary for the party applying, to reveal to the underwriters his surmises, or speculations arising from facts not exclusively within his own knowledge, even if such opinions be sound & natural.—

Most elementary writers lay it down that a Policy of insurance is not much higher in its nature than parol evidence, which may be explained, altered or rendered void by parol. These have founded their opinions upon the authority of a case in Salkeld 445.—

Salk 445.

Mr Reeve knows of no decisions recognizing this principle, but the one in Salkeld & one in Skinner. He conceives the authority in Salk. not to be law, for it is opposed to the spirit of the Common Law & tends to pernicious consequences.—

Wilful mismanagement of the Capt. or mariners discharges the underwriters from their liability — as a deviation from the course without any apparent ne-

cessity or good reason, which amounts to Barratry or a change of voyage. &c. —

Going from one port to another in its vicinity is not considered as a change of voyage if done after the vessel has made her destined port, altho' any considerable deviation previous to that would.

Ask 445. 19 E. 88. 2 Stev. 32. Dano. 16. 1 Show. 324.

A deviation which does not arise from the fault of the agents of the insured, however, but arises from unavoidable necessity or accident; such as a deviation in search of convoy after separation, or in consequence of stress of weather &c does not discharge the underwriters. —

2 H. Bl. 343. 5 D. R. 581. Tha. 1249.

When there is manifestly an intention to deviate, but the intention is not executed, it does not discharge the Insurers. —

If a vessel deviates the underwriters are liable, so far as to the deviating point, at which the vessel leaves the course to the place where she is insured, even if the intention of the owners was known to the underwriters ~~was~~ before the sailing of the vessel. —

Tha. 1249.

But if a vessel insured for a certain voyage, actually sails upon another, & is actually lost before she arrives at the deviating point of the two voyages, the insurers are discharged. —

Dano. 16. 346. 2 W. C. 30. 32.

This rule at first glance appears not to be reconcilable with the rule that an intention to deviate does not discharge the underwriters. —

But the difference in the cases consists in this; in one instance the vessel was cleared out for the same port to which she was insured, altho actually intending to go to a different one, here when she was lost before she arrived at the point of deviation, the underwriters were held liable. In the other instance she was not cleared out for the same port to which she was insured, & the insurers were holden not liable. —

When a man has procured his vessel insured twice, only one of the policies is valid, & the party must take his election which discharges the other who is bound to return the premium. —

But this can only happen when the first insurers have or are likely to become bankrupt. —

When the owner is insured against the barratry of the master, & the Master for the interest of the owner deviates from the course, the underwriters are discharged; for Barratry is a willful and criminal mismanagement ~~of the~~ or deviation. —

Stra 1173.

But if the Master had deviated to gratify his own feelings or interest it would have been ~~the cause~~ barratry. —

Stra 1266. 1264.

When the crew compel the master to alter his course it is not Barratry in him.

Vessels are sometimes insured "until they arrive" & a certain time after, which is commonly stipulated as being part of the voyage, & in most Countries is

limited to 24 hours, within which period if any loss happens the underwriters are liable. —

A vessel insured in this manner arrives in port, if before she has been there 24 hours is ordered to go back a certain distance & perform a quarantine; while performing it she is lost; the underwriters are liable

Sta. 1243.

Sometimes vessels are insured until they arrive & are discharged, the word discharged is now settled to mean, unloaded of lands, therefore when a ship arrives, the underwriters are to see the goods unloaded & the owner or purchaser employs lighters or other boats to convey the goods a shore & after they are taken from the ship an accident happens to them by which they are damaged or destroyed, it is no charge upon the insurer; but if the goods had been sent ashore by the boat which is considered as part of the ship, & voyage it would have been otherwise. —

Sta. 1236.

Molloy. 288.

Insurance against the perils of the sea includes all damages from winds, waves, tempests lightnings &c —

2 Boll. 248.

If a vessel is not heard of within a reasonable time, she is considered to be foundered at sea. In the case cited from Strange, in a voyage from Carolina to Eng. when the ship had not been heard of in 4 years, it was accounted a reasonable time.

Sta. 1199.

Park. 63.

Mr Reeves thinks a much shorter time would be holden as reasonable.—

Underwriters are liable in cases of embargoes or
2 Ven. 176. a detention of any kind by a foreign power unless it arise from real conduct of the Master or mariners, as an attempt to evade the duties &c.

Loss is total or partial of average

The word total as used in the mercantile Law does not mean the same thing, as total in common parlance. A loss less than to total may be a total loss by the L. Mer.—

Whenever there is a total loss, the insured must
1 Ven. 98. abandon the property saved, to the insurers, & this
Bun. 683. property is termed the salvage.—

1 Vernante Generally if a ship be captured by an enemy
Sha. 1056. & afterwards recaptured, the loss is considered total.

Where the salvage amounts to more than the
3 Mk. 195. freight, it is an average loss, & generally an average
1 Q. 187. loss, is any loss less than a total loss.—

The Insured may abandon in the following cases,
Sha 1066. viz; 1. Where the salvage does not exceed the freight

2. In case of capture. as soon as the owner hears of the capture, he may abandon; but if he do not at that time
Bun. 683. 698. abandon, & the capture should only prove a hindrance, it may be a partial loss.—

Bam. 198. In case of a re-capture, the re-captures generally have
3 Wh. 189. a reward, dec.t which is termed salvage.—

If a vessel is recaptured and proceeds on to her port of delivery, before abandonment, the loss is average, if the abandonment is before her arrival at such port, the loss is total.—

The ship "Swift" being insured from London to Carolina was taken by a Spanish privateer, & afterwards retaken by an Eng. Vessel, & carried into Boston
3 Wh. 195. where no person appearing to give security, she was con-
1 Wild. 190. demned & sold by the Court of admiralty; the realizes that the maiety, & the remainder remained with the ob-
1 Ca. 125 l. tainers of the Court. It was holden that the loss was a total one & that the money should go to the underwriters

When there has been an immediate ransom, it is an average loss

If the case of the revolutionary war, a letter of Marque sailed ~~out~~ from N.York & took a valuable prize, ~~soon after~~ which she was lost. The owners not knowing that she had taken a prize, abandoned, & the next day the prize arrived, which was much more valuable than the vessel insured, the loss was considered total, & the prize the property of the underwriters, as belonging to the letter of marque.—

A declaration framed to recover upon a total loss, is good to
Bam. 904. recover upon a partial or average loss, & if a Plt. fail in his
Bam. 98. action upon a total loss, he may upon the declaration recover

Law Merchant.—

upon an average loss.—

Charter Parties.—

When a merchant agrees with the master or owner of a vessel to hire the vessel to take goods to A. & bring others back; he is said to charter the vessel, & the written instrument containing the agreement is called a Charter party. This is either at a certain rate per ton, or for any agreed sum in gross.—

Vessels are said to be chartered either outward or inward, for voyage, or outward & inward.

What is peculiar in this species of contract, is, that if the vessel is lost before she reaches her port of delivery, provided she is chartered for the outward voyage, the freighters pay nothing. If she is chartered outward & inward; & arrives safely at the port of delivery, but is lost returning, only the ~~inward~~ outward freightage is lost. If she is chartered inwardly only & is lost the freighter pays nothing.— If chartered for the voyage & is lost going or returning nothing is paid.

2 Pont. 212.

If the vessel is chartered out & in, & goes out delivers her cargo, & per default of the Factor of the freighter takes none on the return, the freighter pays as much as if she had brought his goods. But if it is by default of the master, that she did not bring the freigh-

ters goods, the freighter is only liable for the outward voyage. —

If the master imprudently & contrary to custom sail in a storm, or up a river, or in other dangerous places
1 Sid. 246 without a pilot & any damage ensue therefrom, the owner & master are held liable. —

Tho' if the freighter chuse he may aban-
Bum. 882.
888. don by relinquishing his goods, & relieve himself from the freightage. — But he must abandon his whole interest or not at all. —

If the vessel be disabled without the fault of the owner he may refit if he can do it, within a short time or he may be entitle to freightage.

So if the vessel be captured & recaptured, or ransomed, or if it be disabled & the freighter choose to take the goods any where except at the port of
Bumaw. ante. delivery, he shall pay a ratable proportion of the freight — as if when the accident happened the vessel had past performed the voyage, the freigh shall be paid proportionably.

Merchants sometimes freight vessels without putting their agreements in writing. This is not a ~~[illegible]~~ correct way of doing business, but it is recognized by the Law Merchant, & has this peculiarity in it, viz. if the freighter from any cause choose to recede from his bargain he may do it at any time before the loading is commenced, by relinquishing to the Master the ~~amount~~ the earnest money, which is a sum always paid by the freighter to the Master & necessary to

render the contract binding. —

The master may also recede from his bargain, by paying back double the earnest money i.e. by repaying the merchant the earnest money advanced by him & as much more. —

But by the Com Law of Eng. the party damnified may bring his action on the case & recover damages arising from a breach of the agreement

When a merchant freights a ship, but does not hire her (as when the owners supply every thing for the voyage & receive the goods at a certain premium) this is termed freighting without Charter Party. —

Where any injury happens to the property of the freighters, through the misconduct of the Master, whether it be omission of duty, or commission of wrong he must be answerable; but injuries arising from no default or misconduct, but from inevitable accident, subject neither the master nor owners. good maxim!

A special contract between the master & owners, that the former shall have the benefit of the freight, does not affect the freighters, nor in anywise alter the liability attached to the owners in case of a misconduct or neglect of the master; for

Barbo. 8.5. 194. the freighters are not supposed to be privy to the special contract.

Sometimes a special contract is made between the freighters & owners, this subject the owners no further than the law itself would subject them, except

that if there be a penalty annexed to the agreement, that is forfeited also; it may serve to shew that the freighters are to look exclusively to the owners, to whom the master is in turn liable. —

Embezzlement or any thing of the kind either in the master or mariners subjects the owners to the whole extent of the embezzlement. —

It is a general principle that persons employed to carry property from one port or harbour to another as pocket masters, boaters &c. stand on the same footing as common carriers & are liable not only for neglect, but at all events, except in cases of inevitable accident or the acts of providence. —

1 Vent. 190 238. 1 Mod. 85. 2 Lev. 69. 3 Bl. 259. 2 Roy. 918.

If a freighted ship is at sea, & an accident happens which ordinary care could not have prevented, the owners & master are excused, but if a loss happens in port, they are governed by the law of COMMON CARRIERS. —

1 Ward 376. 2 Vern. 473. Comp. 636. 2 Ld. Ken. 643 1 H. Bl. 119.

The mercantile law gives to all masters of vessels when abroad, the power to contract for necessaries for the ship so as to bind the owners: Having furnished the master with money for such purposes it does not discharge the owners, for the Master is to be credited as their servant for whose contracts they are liable: He may even pawn the ship for necessaries. - The master is also personally liable in this case. —

Hardes 85. 195. 376.

An owner of a vessel cannot get rid of his liability to persons furnishing provisions, or necessaries -

as where an owner leases his vessel for any number of months or years, if within that period it becomes necessary to furnish the vessel with tackle, or provisions, the owner tho' he may not know where the vessel is & may have no interest in the freight, is
Hendw. 85. 195. 376. still liable in default of the master. This is not founded on Com. Law principles; for such owner it is said is not liable for the faults of the master, & the master tho' he contracts as agent for another, is also
2 Pow. 643 on contrary to the Com. Law rule holden liable. —

When there are joint-owners of a vessel the majority of such owners in interest shall direct its course & destination, but cannot compel the minority to
Molloy. 220 assist in fitting for the voyage. But tho' they may do this without the consent & contrary to the wishes of the minority in interest, yet it cannot be done without their priority. —

If the voyage is a profitable one, the gain shall be
1 Beatt. 16. or 2 6. equally divided among all proportionally to their several
1 Roy. 135. interests & the minority shall become liable to pay
2 Pow. 643. their proportional share of all expenses & disbursements.

But if the majority choose they can take all the profits of the voyage to themselves by giving sufficient security in the Court of Admiralty to make up all losses to those of the owners who do not consent. —

Continuate
1 Roy 223 Indeed the minority may by applying to the Court of Admiralty to give security, see that the other return

of the verse. & the recognizance is suable in the admiralty
2 Ca. 1235. court. Andrews. 475. 6 Mod. 162.

But where two joint owners
Molloy. 221 sent out a vessel without the consent of the third, if she
was lost, the third was allowed to bear his proportion of the
loss; because had there been a profit in the voyage he
Vent. 297. would have been entitled to his share; but in this
case there had been no application to the admiralty
courts, as there ought to have been. —

The amount of the voyage settled by a majority of
1 Ver. 465. the owners binds the rest. —

When a loss happens at sea in
consequence of a storm of weather, danger of shipwreck &c it
is a principle of the law. Mer. to equalize the loss as much
as possible among the owners of freighters of a ship; for
it would be extremely unjust that the whole weight of the loss
should fall on the person whose goods are sacrificed in
time of extreme danger for the preservation of the rest. —

In such cases the laws of Oleron (which are the foundation
L. Oleron of the mercantile law of Europe) make it the duty of the
Cap. 11. master just to throw overboard the heaviest articles of
those of the least value: if the oath of the mariners that the
property was thrown over for the preservation of the ~~ship~~
vessel discharges the master. —

So goods damaged according to the laws of Oleron
Molloy. 246. are cleared by the oath of the Master & mariners
This principle which uniformly governs in averaging the

losses, is that they are to be averaged, only when the loss of the property sacrificed contributes to the preservation of the remainder.

There has been a decision which perhaps does not entirely quadrate with this principle, viz, where a master took in more freight than he agreed to do in consequence of which part of the goods were thrown overboard, the loss was not considered average: Quere would not the master in this case be liable?—

When goods are taken away by pirates, the loss says the Recover, must be borne exclusively by those whose goods are taken, but in this case might not a giving up a part of the goods preserve the rest from plunder, & so contribute to their preservation?

A vessel was loaded with silk & oil, the silk belonging to one person & the oil to another: she was chased by a privateer & run into port: the master fearing that she was not safe, got out the silk & threw it ~~overboard~~ on shore where it was saved: and the bulk of the oil precluded the possibility of landing it, & it was taken: the owner of the oil filed a bill in chancery to compel the owner of the silk to average the loss, but the Court refused, for the saving of the silk did not contribute to the loss of the oil nor did the loss of the oil to the saving of the silk. —

Molloy 246. to. 252.

By the Com. Law the Master of a ship cannot impawn the ship or goods, for there was in him no authority either general or special, & no such power is given to him by constituting him master. —

2 Pbr 505 Dalt 252. 2 Sid. 261. Mollor 237. Leg. Recor Cap 12

Law Merchant.

Yet the Com. Law has esteemed the law of Oleron reason-
Com. 1.12 able which empowered the Master to withdraw or hypoth-
Roy. 96 ecate the ship for necessaries
Salk. 34

it is laid down that an hypothecation by the master when no real necessity exists for such
2 Bid. 265 hypothecation, subjects the owners equally as are made upon the master's absolute necessity, for he is the confidential agent of his employer, & the person to whom the vessel is hypothecated is not to judge whether or not there be any necessity for it. That the owners are left to their remedy ag^t the master.

Of Bottomry Bonds.

Bottomry bonds agree in many particulars with hypothecation, for in bottomry bonds, the ship is taken as pledge
Molloy 345. as a collateral security for money lent, altho the obligor in
Molloy 359. case of a safe return is personally liable.

A bottomry bond may be defined to be an instrument, by which the owner of a ship pledges his ship, & is likewise personally bound for the repayment of money lent, depend-
2 Bl. 457. Molloy de jure 340, 1 Geo. 208 50 8. 5 Co. 70. ing upon the contingency of his making a safe return. If the ship is lost so also is the money of the lender, but if it performs the voyage in safety, he receives back his principle together with the premium agreed upon, — which no extraordinary in the rate can render usurious. For the extraordinary hazard encountered by the lender balances the extraordinary interest which he may receive, & renders the con-

but reciprocal.

In this species of contract the tackle as well as the ship (if brought home) is liable as well as the person of the Borrower.

But if the money be borrowed upon the
2 Bl. 458. goods & merchandize only, the borrower is liable personally for the contract, & is said to take up money at respondentia.—

The general nature of a respondentia bond
2 Bl. ante is this: the borrower binds himself in a large penal sum, upon
Chr. notes condition that the obligation shall be void if he repay the lender the sum borrowed, & so much ~~per~~ month, from the date of the bond, till the ship arrives at a certain port, or is lost or captured in the voyage. The respondentia interest is often 40 or 50 p.c. cent.—

The Law of Partnership.

To render a man liable as a partner, there must be either a contract between him & the ostensible person to share
Doug. 356. or 371. jointly in the profit or loss; or he must have permitted the
10 H. 402. other to make use of his credit, & to hold him out as one
1 Bl. 37. jointly liable with himself.—
Heb. 247.
Bl. R. 998.

Merchants trading in partnership are not as tenants in common, for the L. M. does not recognize the jus accrescendi of a right of survivorship incident to joint tenancy.—

Law Merchant

The property of a deceased partner vests in his Exr. but the
Salk 444. surviving partner has the right of suing to collect such of the joint property as is not in possession. She has the right however under the liability to account with the Exr. of the deceased partner. —

A surviving partner may not join in one declara-
3 Term 433. 435. tion a demand accruing to him as survivor, & a demand accruing to him in his individual capacity. —

Survivors of Merchants in partnership must sue
Salk 444. 1 Chan. 183. & be sued by themselves, that is the Exrs. or Admrs. of the deceas-
188. 190. ed partner must not be joined with them in the suit.

The ~~Exr.~~ survivor must account with the Exr. of the de-
see supra ceased partner & pay him his proportional share of the partnership property. It has been contested whether the surviving partner shall take all the goods, & account for one half of their value (in the case of an equality of interest between the partners) or take only one half of the goods. — Mr Reeve thinks that he should take one half of the goods.

It has been said that the surviving partner has
Salk 444. Comb. 474. the absolute control of the joint property: this idea Mr. Reeve considers as being very incorrect; for an absolute control seems to be equivalent to an a complete ownership.

The true rule seems to be that the property vests in the Exr. by reason of the inconvenience of joining the survivor & executor in an action (since in this case ~~of~~ one would sue in his own right & would be liable to Costs,

& accept: of the other in the right of another and would not be so liable) the former is ~~empowered~~ vested with the power of collecting so much of the joint property as is in action.

The joint property of the partners is always liable for partnership debts, if so long as it continues solvent, for the private debts of each partner.—

The private ~~debts~~ property of each partner is liable for the debts of the firm provided it exceeds the private debts of the Joint Partners.—

While the partnership continues solvent, any person may levy Execution on the goods of the partnership for a debt of either of the partners: may sell the whole of the property on which he has levied, & remit to the other partner or partners his or their proportionable share of the avails: (in which case it is usual to levy on a much larger quantity of property than is sufficient to pay the debt) or he may levy only on enough to pay the debt, if it do not exceed the proportional share of the joint property in which case it might be better to levy on the whole & remit the surplus to the other joint partners.—

But if the partnership be insolvent, the private Estate of each partner is first liable for his private debts, & the surplus if any, then goes to pay the partnership debts. So as the case may be a private creditor may receive 20/ on the pound of a partnership creditor only ~~one~~ 1/—

Beawes L. Mer.

Each partner is not bound for the private debts of the other: for if one of the partners becomes insolvent

Law Merchant

the partnership is dissolved & the company funds are divided among the proprietors.

Therefore both partners are liable for the Company debts, & for the whole of them: but the Company is not liable for the Company is not liable for the private debts unless the partnership debts are first discharged by it. So this rule Law. Lu. See last Pa.

Altho' the Ex.r of a deceased partner cannot on a principle of convenience, join or be joined in a dist bt. by or ag.st the partnership concerns, yet he is invested with every other power which the surviving partner himself possesses.

Co. Lit. 187. Salk 444. Show. 189. 2 Ver. 255 Lev. 148.

If the surviving partner be unable to respond the damages which may be recovered ag.st the firm, the Ex.r of the deceased person is liable: In this case the creditors having obtained a judgment ag.st the surviving partner, which is ineffectual to obtain satisfaction may bring an action of debt on the judgment against the Ex.r. — In Eng. this action is customarily bt. in a Court of Equity, altho' in the apprehension of Mr Reeve unnecessarily. In Comm.t. it is brought in a Court of Law. —

Money may be paid to the Ex.r of a deceased partner, & very reasonably: for the Ex.r might discover the surviving partner to be in failing circumstances, in which case he could have no remedy, & as the Creditors would eventually come upon him, it is reasonable that

he be sunned. —

If A & B carry on business even in sep-
Eq. 371. 372. arate houses, under an agreement to share in each others
10 Wm. 682. profits; each is liable so far as it respects the rights of
2 Ves. 247. third persons for the others losses, altho there be an ex-
press stipulation to the contrary. —

If one partner be charged beyond his proportion, Equity
1 Ca. 367. 374. gives him a lien upon the partnership effects. —
1 Eqca. ab. 8.

When partners in trade become bankrupts; the mode
5 Sum. 601 of settling the estate is to apply the joint-property to the
payment of the company debts, & the private estates
of the partners, (in the first instance) to pay off their re-
spective debts. If there be a surplus of private property
it is also liable for the debts of the company. —

If there be a surplus of the joint property and a de-
ficiency of the private: so much of the former as belongs
to any one of the partners may be applied to the pay-
ment of his debts, but not to the payment of the private
debts of any other partner. —

If one of the partners be insolvent &
the other solvent, & there is a surplus of the joint property;
the surplus is divided, one proportional part being ap-
plied to pay the debts of the insolvent partner, & the remain-
der to be divided among the remaining partners. —

Before either of the partners become bankrupts the
1 Ca. 366.
2 Mod. 277 foregoing principles are not applicable; for this property
1 Show. 173. both joint & several is liable indiscriminately, for they

for every debt joint & private, & a levy may be made
Doug 627 upon the estate of either or both the partnership property
1 Roy 871. or upon the private effects —

But when they are unable of paying their debts the before-mentioned principles apply. —

However when A one of the firm owes a private debt no execution can be levied upon the private effects of B another partner; altho' the company property may be levied upon; but in this case the property of B who never consented to pay the debt of ~~the~~ A is taken away ~~of the~~ to remedy this defect or injustice two modes have been devised. I When the goods of A & B merchants in company are attached for the private debt of either, only one moiety of them is sold, ~~if it is not sufficient to discharge the debts~~ as where a levy was made upon two barrels of flour, one only must be sold, & if it is not sufficient to discharge the debt, two more must be levied upon & one sold & so on until the debt be discharged. II. But the mode which has been found most the most convenient is to levy upon & sell property to twice the amount of the debt & return a moiety or proportional part of the money to the private estate of the other partner. —

For the difference between a partner & life of a sub-contract see 1 Hob Bl. 37.

1 Term 478. One partner cannot recover in Indebitatus Ass. a sum of money received by the other on the partner

ship account unless there be a balance struck.

After the dissolution of a partnership, the ~~partner~~ 1 Ch. Ca. 155. a single partner authorized to receive & pay the debts 2 Hob. 18. cannot bind the others by giving a security in the name of the firm.—

If one of several partners contracts as 4 Term. 725. 727. for himself, i.e. without dissolving the partnership; still 1 Ch. Ca. 45. if the contract be in fact made for the partnership; proof of 48. this fact (altho' at the time of ~~contracting~~ making the contract it was unknown to the party contracting with the partner) will render all the parties liable.—

A contract made by one of several partners relating to the partnership business, binds the rest.— And 1 Salk. 292. 1 Ch. R. 993. even after partnership is ended or dissolved, a contract 2 Camp. 449. thus made will bind unless public notice of the dissolution be given.—

Factorage.—

A factor is one employed by a merchant in one country to transact business for him in another.—

The factor acts under a COMMISSION from his principal, to the terms of which he must strictly adhere & the authority of which he cannot transgress.—

COMMISSIONS are either general, or special. A general 1 Burr. 103 commission of which the essential words are "buy & sell as your own" invests the factor with a discretionary power & renders him

liable only to gross ignorance, neglect or mismanagement.

Mr Ray 495. 2 Mod. 100. 3 Lev. 638. 1 Mod. 144.

A special commission in which the important words are "sell & dispose," does not give a discretionary power, he cannot under a ~~special~~ general commission sell the goods on credit, unless at his own risque, for in the due exercise of his authority he ought to receive a quid pro quo, & as he delivers the one to receive the other.

The remedy against the factor was formerly in Eng. by way of account & is now so here, but in Eng. recovery is obtained in an application to Chancery. —

One of the same factor may act as agent for several merchants, who tho' they may be strangers to each other must run the joint risque of his actions: as if five ~~dis~~ merchants should remit to one factor five distinct bales of goods, & the factor makes a joint sale of them to one man who is to pay one moiety down and the remainder at 6 months — if the vendee fails before the 2 payment each merchant must bear an equal share of the loss, & be contented with his dividend of the money received. —

Salk. 126.

But it has been decided that if such a factor draw a bill of Exchange on all of these five merchants & one of them accepts the bill, the others shall not be obliged to make good the payment. — Sed tamen quere de hoc. —

1 Rol. 24. Co. Lit. 89. Mollow. 495. 4 Co. 84.

Fidelity, diligence & honesty is expected from the factor and nothing further, & he is not liable for damages, occasioned by inevitable accident, or even for those which extraordinary diligence might have prevented, as theft & the like. —

And so on the other hand the same things are required in the principal — for if a merchant by fran-

dulent representations of his goods, or otherwise and causes any damage to the factor, he shall not only make it good, but render satisfaction to the party damnified, by purchasing under such false representation. —

Bro. J. 468
Poph. 143.
Gol. 137.

It has been decided that where a factor defrauded the State of its customs by running goods, in which he encountered the hazard of a capital punishment, still not being discovered, he was allowed to change the duties on his principal's revenue. — Mr Reeve thinks this to be in the teeth of every rational idea, of principle, of an abominable practice, but is entirely of opinion, that if the principal is cognizant of the act done by the factor, he ought to pay the duties; for in running the goods, he runs the risque of his life; but a contract with a factor to run the goods would not be binding. —

16 Ch. ca. 25
Bro. J. 265.
Female Lt. Factors.

The sale of goods by a factor known to be such, will bind the principal; but a factor cannot pledge them for his own debt. —

Stra. 1178.
1182.

When a factor is known to be such, & acts beyond his commission purchases his goods, & promises to pay, for them, the principal is holden; for it is not expected that every one dealing with a factor, who is a credited agent of his employer is to examine into the extent of his commission. — But here the principal has his remedy against the factor. —

2 Var. 638.

If the factor does not follow his commission, he not only lays himself open to damages, but forfeits his commission itself, & his pay, which at Com. Law he would not.

Where a factor was directed to insure, & neglected to do it, he
2 Vesy. 239 was held liable.
Burr 489.

When the factor is publicly known as factor the principal may if he apprehends the factor to
Comp. 255. be unsafe, notify his debtors not to pay what is due the factor, as factor; if afterwards they do pay him it is at their own risque. This applies only to public factors, for if he is only a private agent & sells merchandize as on his own account, the person dealing with him is not at all accountable to his principal, more than to any indifferent person.

Factors have a lien not only for their commission,
Burr. 489.
2 Swift 10.
but for the balance of a general account & for which he may retain them.
4 Burr 2221. Comp. 251.

It is important in the law of factorage that the factor is sometimes obliged to take better care of his principals interests than of his own: as where he sells the principals goods & his own together, he must apply the money first received to the payment of the debts of his principal.

If the factor having property of his principal in his
2 Burr. 638 possession, dies, or becomes a bankrupt, his Exrs. or assignees have nothing to do with the principals goods,
1 Salk. 160. but if it is money, unless it is so separated, & marked that it can be distinguished to be the property of the principal, it will go to the assignees &c. The factor is not in that case considered as the principal's debtor. but as his agent.

The stopping of goods in transitu.

This stopping of goods in transitu is a creature of the mercantile law, for at Com. Law if a man sells his property it absolutely vests in the vendee at the time of making the contract, altho the thing sold may remain in the possession of the vendor; but according to the L. M. when goods sold are delivered to the order of the vendee, they may be stopped in transitu, that is, before they come to the actual possession of the vendee.—

But this stopping in transitu, is never allowed unless the vendee is ~~never~~ either a bankrupt, or is supposed to be in failing circumstances; it is intended to secure merchants in their property.—

The transitus ends when the goods or any part of them are actually delivered to the vendee; or even to his agent, provided it be at the agent's place of residence.

2 B & Pl. 505.

Suppose a bill of lading has been consigned or delivered over to the agent of the bankrupt, if he for a valuable consideration assigns it over to a third person. If the bill of lading is negotiable, the assignee of the consignee will have a vested property, & neither the consignee or vendee can reclaim the goods.—

The bill of lading has of late been determined to be negotiable.

2 Term 63.
5 Ve 683

Law Merchant.
Of Mariners.

4 Bl. 666. The contract which a seaman enters into is a voluntary one, & every thing respecting it is regulated by the law merchant.—

When there is no special agreement
1 Sid. 129. to the contrary, mariners are entitled to their wa-
Burr. 1844. ges at the port of delivery.—

If hands are taken from the mariners & officers of the ship not to demand their wages unless the ship returned to the port from which ~~the~~ she sailed, & she arrives at the delivering
2 Vern. 797. port, & is afterwards taken the seamen & officers shall have their wages to the time of the arrival of the ship at the delivering port.—

Indeed the law has restrained mariners
Sid. ante.
3 Burr. 1844 from contracting so as to lose their wages, for if a seaman
D. Roy. 576. contract not to receive any wages until the vessel shall
639. have returned home, & the vessel in returning is lost, he
1398. loses his wages only from the last port left.—

Interest is due on the wages of a seaman from the time of the vessels arrival at the port of delivery.—

Seamen lose their wages by making a on dis-
D. Roy. 1212. turbance on board the vessel, in which case the Capt. may
1 Dem. 79. confine them or put them on shore: also by rebelling against the master unless the reasonably repent; by wil-

ful absence which occasions delay. — And in all cases by leaving the vessel before she is discharged of her loading. —

A seaman disabled by accident to perform the whole voyage, is notwithstanding entitled to wages for the whole voyage. —

2 H.Bl. 606.

Omitted of desultory rules, examples &c.

At Com. Law whenever there is a time stated, within which any act is to be performed, if the day of the expiration of the period falls on a Sunday or some noted feast day, the act may be done after. By the Law merchant it must be done the day before. —

So when any number of days are allowed for the performance of any act the Com. Law computes from the expiration of the day on which the instrument is dated, to the completion of the last day allowed. For instance the Com. Law would make a bill payable on the fourth day, when by the Law merchant it would be required to be paid before the expiration of the third day of the days of grace. —

Mr Reeve has never found a case in which it was decided that days of grace are allowable in promissory notes: but Gould seems to think that it has been settled that they shall be allowed in the cases quoted in the Margin. —

Fortescue 376.
1 Term. 167.
Floyd. 78.
Doug 62.
3 T.R. 174
4 Term. 148.

Doug. 237, 8, 9, 150. ..... At Com. Law a right of action once accrued

cannot be given up by parol without a valuable consideration; but it may by the law merchant — as where a Payee or indorsee of a bill, or note discharges the indorser or acceptor. —

It is to be noticed that such indorsers or acceptors of Notes or bills as the holder chooses to hold responsible, must have notice given to them, as is required to be given to the Drawer in case of protest. —

The last rule is not to be understood as applying to a person not interested in the bill to its full extent; for tho a stranger become bound by his endorsement, & liable to the indorsee, yet it will not render the note assignable

It is said that if the agent of the drawee shew his power of attorney to the Payee or indorsee, the latter must consent to his (the agents) acceptance of the bill. —

Esp. N.P. 115
269.

That a bill is good in the hands of an innocent holder, altho it may intermediately have been acquired by fraud or even theft See Burrow 452. —

When a bill by some unavoidable accident, — as contrary winds, is delayed until the time of payment is ~~elapsed~~ passed, the holder must nevertheless present it for acceptance & payment & get it protested if not accepted or paid & the parties shall be bound as in other cases

Molloy, 6.
Edit. p. 303.
The S. Edit. of Molloy is usually quoted in the same terms. —

If after acceptance the Drawee absconds, proof being made of it by the protest of a Notary; the Drawee may be compelled to give better security. —

Prov. 743.

Protest was not required to Inland bills

till the Statute 9 & 10 of Wm. ~~& Mary~~ 3 Cap. 17, nor does the want of it since that Statute destroy the holders remedy at Com.
3 Bac. 614. law, to recover all but interest & costs. Protest is not necessary for a Notes.

If the drawer pay a part of the bill it shall be allowed
1 Ld. Ra. 98. in favor of the acceptor. So if the Drawer pay the whole, the acceptor is discharged.—

80

81

82

Evidence.

Evidence is a term so universal & comprehensive that to analize all its relations & pursue its connexions thro' all its ramifications with the various incidents of life, would require more time & attention than any lawyer can afford to devote to a single branch of his profession. But there are certain great leading & governing principles which have obtained on the subject that come properly within the scope of a lawyers enquiry & which therefore shall engross our attention in these lectures.—

But before we enter upon a particular examination ~~of these~~ of practice & application of these principles to legal science it will be proper to consider them on a general scale. And we shall therefore at present take a ~~preliminary~~

General View.

To understand with accuracy & precision the subject of evidence it is indispensably necessary to define the three radical terms with which it is most conversant, lest they should be confounded & mistaken.—

Witnesses are persons who testify—
Testimony is what they declare, and
Evidence is the result of this testimony.—
It is an universal rule applicable to all cases & to every

species of evidence, that the best evidence must be adduced which the nature of the case will admit of. This does not require the best possible evidence, but the best evidence which the party required is able to produce. for unless he produces that, it must be inferred that the better evidence which is reserved makes against him, & therefore it is, he is unwilling to adduce it. — As if an action on a Bond where it is proper to produce the Bond itself in support of the declaration, the Pltff. should not produce it, the Court & Jury must infer that the bond makes in favor of the Deft. & will therefore admit no other proof to explain or confirm it. — But where the Pltff. in his declaration states that the bond was burnt or destroyed, then other proof will be admitted to shew what it was, as the best proof which the nature of the case would admit of. —

I. The first great division of Evidence is into written, & unwritten or parol.

I. Written Evidence, consists of several kinds viz:

1. Record Evidence: This consists of the memorials of the Legislature & of all Courts of Justice & is conclusive beyond all manner of contradiction. No parol proof will ever be admitted to aid, refute or qualify it in any manner. — But as the record itself cannot be removed from the proper Office assigned for it, a Copy of it duly certified is as good as the ~~Copy~~ Record itself, since it is the best evidence the nature of the case will admit of. — But an extract of a Record of objects to cannot be admitted as good evidence, for it may be varied in its

signification by the context. — Thus when debt is brought on a judgment, the record of the judgment, the record of the judgment or a copy of it must be produced, nor can it ever be ~~dispensed~~ dispensed with, since nothing else will suffice, unless it has been lost by inevitable accident. —

2. Deeds — If the Law in any case requires a deed in order to transfer a title, it must be given if produced in Court in order to establish it — No articles of agreement to sell — No memorandum of having sold will avail in such cases, since a good Deed is indispensable except when it has been lost by inevitable accident, when other proof will be admitted to shew what it was. — And even in cases where the title itself does not depend on the deed yet if it appears that a Deed has been given, this is the proper evidence to be introduced in order to establish the title, if this done. —

3. Written Contracts &c, than deeds. — In such cases where the Stat. of Frauds & Perjuries requires a Contract to be in writing, it must be proved to be so, or the case will not be supported, because the law declares that nothing else shall be evidence, if not because the best evidence the case admits of is not introduced — And where the law does not require the Contract to be in writing, yet if it appears to be in writing, the written contract must be adduced, if the Court will not suffer a parol contract to be proved. For it is a general rule that no parol proof shall be admitted, to restrict, enlarge, or explain a written Contract. — And if the parol proof is adduced to vary or enlarge the meaning of the writing, it cannot be admitted according to the general rule — And it is always conclusively presumed that all the Contract was reduced to ~~one~~

4 Ls. 275

writing, or in the language of Lawyers the Contract speaks for itself, & nothing will be admitted to rebut this presumption.

True indeed if the written contract in such cases is left or in the hands of the party's antagonist, parol proof may be admitted to shew what it was agreeably to the universal rule, that it is the best evidence which the party can adduce, & the general rule is dispensed with.—

II. Parol Evidence consists of proof derived from the mouths of witnesses, & in we must consider who are totally excluded from testimony.— & 1st who are totally excluded from all testimony are

1. All persons Interested in the matter in question.—

2. All persons legally infamous and

3. Many persons are excluded on principles of policy.—

I. The Interest which excludes persons from all testimony, must be a pecuniary interest, or an Interest in point of property, the quantum of which cannot be fixed.— No bias arising from relationship friendship or intimacy will exclude — this only goes to their credibility.—

Again — This interest must be an interest in the event & not in the question.— By an Interest in the event we dont mean that Execution must issue in the name of the witness to exclude him, but merely that he must have a direct or consequential interest in the issue of the suit about which he is to testify.— A direct interest in the event is where the witness is to be immediately affected by the judgment now to be rendered — as where the witness agrees with the Deft to pay half the judgment which is obtained against him.—

Evidence.

A Consequential Interest in the event is where the witness is not directly & immediately, but indirectly affected in point of property by the judgment to be recovered in the present case — as where the witness is bail for the Deft. in the suit about which he is called to testify

The UNIVERSAL RULE of evidence in these cases & to which there can be no exception is this — If the judgment to be obtained in the present suit can ever be used either to found an action against or in favor of the witness; or can ever be used as evidence against or in favor of the witness in any action whatever, such witness must be wholly excluded as incompetent. —

But an Interest in the question does not exclude — This interest in the question is almost undefinable — It consists in the anxiety or interest of the witness to have the judgment rendered in this case in a certain manner because it may eventually benefit him, as where he has a case depending on the same principles, & is altogether distinct from an interest in the event. —

Neither will a mere Contingent Interest exclude a witness unless the judgment to be obtained in the case may be made use of in favor or against him. — But such an interest merely goes to his credibility, & not to his competency: thus an heir may be a witness for his father in Ejectment to recover land, which must in all probability in a short time come into his own hands.

2. All persons legally infamous are excluded from being witnesses — To be infamous in this case they must have been convicted of the Crimen falsi which is any offence which goes directly to impeach the integrity and honesty of the man

who is convicted of it. — As Forgery, Perjury, Theft &c &c —

In all these cases the record of his conviction must be introduced in order to exclude the witness on this ground. —

3. — Many persons are excluded from principles of policy. — among these are husband & wife who are forbidden to testify for or against each other — and they are not allowed this even altho no objection should be made if both show wish it — In this respect they differ from interested witnesses who may testify in all cases if they please, where there are no objections. —

So also an attorney cannot testify in his Client's cause, any thing which he has derived from his Client, altho he should wish it, & altho no objections are made to his testimony. But any thing which he derived from any other source, or before he was employed in the cause, he may testify as any other person. —

It is also a principle which Judge Reeve believes was introduced by Lord Mansfield, that whenever a person has given currency to any instrument, he cannot impeach it afterwards in a Court of Justice. — As the Indorsee of a bill of Exchange &c — This principle tho not relished by later Judges, has not however been broken in upon & it may now be considered & recognized as settled law in Connecticut. — See Peake's Evidence — where the old doctrine is overruled — It is on the ground of policy that Atheists are excluded from being witnesses. The law as it once stood was supposed to exclude all infidels or persons not be-

believing in Christianity as deists, Hindoos &c but this has long since been exploded, & atheists are now the only persons excluded on the ground of faith. This exclusion merely results from the nature & form of an oath which is a solemn appeal to God. —

No person is a witness in a Ct. of Justice without an oath unless the parties agree to dispense with it — To this general Rule there is one exception, where the witness is of such very tender years, that he will be supposed not to consider himself under greater obligations to tell the truth with an oath than without it. —

The declarations of a person in articulo mortis, however may be testified to in a Ct. of Justice — This proceeds on the ground that a person in this awful situation will feel as solemnly bound to tell the truth, as when under oath, and will not dare to rush into eternity with a lie in his right hand. — If however the person himself has no apprehensions of his situation, altho' in reality he is in articulo mortis his declarations are not admissible as proof. —

It is a General Rule that hearsay testimony affords no Evidence — To this there are several exceptions. —

1. Where the character of a witness for truth & veracity is below the common level of mankind or such that his testimony is not to be credited, but who has not been guilty of the crimen falsi. In this case witnesses may testify to the general received opinion respecting his character & to this alone — for they are not permitted to give their own individual opinion, belief or knowledge respecting it. — And hearsay evidence is the only evidence

in such cases.

2. The declarations of Old people respecting boundaries of land &c may be testified to, ~~ex reputatione vei & ab iis qui circumeunt terras ~~ ~~ut ita~~ ~~ordinatis res~~ ~~ay be ~~ at tho they were not under oath when they made them.

3. The general & prevailing report respecting persons long absent when it is doubtful whether they are dead or alive may be testified ex reputatione vei & all the circumstances & incidents of the story may be told.—

4. So where a witness is dead who formerly swore to certain facts, other witnesses may testify as to what he swore — but if the first witness is alive, & can be obtained, the testimony of others is inadmissible.—

And so if the first witness swears differently in a case from what he swore before, other witnesses may be introduced to testify to the difference — or if the party thinks proper, he may introduce other witnesses to corroborate his present testimony (whether it is questioned or not) by swearing that what he testified before, is the same as that which he testifies now.—

So if one swears differently from what he has before related in ordinary & private conversation — other witnesses may testify as to the story which he has ordinarily told, & thus impeach or invalidate the weight of his testimony, or even to constitute direct evidence of the facts, since the jury in many cases will believe the story before the testimony which contradicts it.—

The first great division of Parol evidence is into direct, where a witness swears directly & positively to a fact, and Presumptive

where a witness swears to certain circumstances from which the triers are to infer the fact, & not to the fact itself. — Thus where the concatenation of peculiar circumstances is such, as ordinarily attend the existence of a certain fact, this is as much as men in their present state can expect to obtain, & the triers will be justified in inferring the fact, tho' sometimes the inference is absolutely necessary from the laws of nature — But the last are peculiar cases. —

Sometimes presumptive proof is called constructive Evidence that is where the only evidence in the case is in writing — As if a lease should be made of land reserving £10 per Annum as rent — Suppose if the lessee enters & improves agreeably to the lease, altho there is no express agreement of his to pay the rent; still there is constructive evidence from the lease that this was the agreement. —

Another great division of Parol proof is into two kinds. 1. Viva voce, & 2. Depositions. —

In Eng. the first only is used in the C.ts of Law, & the last only in their Courts of Chancery. In Connt. we use both kinds promiscuously in both Courts. —

At Com. Law depositions in Courts of Law are not known and they cannot be admitted in our Federal Courts unless expressly authorized by Statute. —

It is a general rule that no parol proof will be admitted to construe a writing

If there is a Patent ambiguity, or an ambiguity on the face of the writing, parol proof cannot be admitted to clear it up — and if it admits of no construction the instrument is void —

as where J.S. gave in his will, all his Estate to the best man in Whitetowers, this was void in toto.—

But of the ambiguity is one by patent, i.e. if it arises from something extrinsic, as where some external thing exists to create doubt in the mind of the reader of the instrument, parol proof may be admitted to clear it up.—

So also if the patent ambiguity arises from the use of an equivocal term, & not from the construction of the sentences, parol proof may be admitted to explain the party's intentions — to where an Estate is given "to J.S. & his Children" if he has Children they take equally with him. but if he has none the term "Children" is construed to mean "the heirs of his body" & it is an Estate tail. — Here parol proof will be admitted to shew the state of his family in order to explain the meaning of the Testator.—

Whenever the Law requires any thing to be recorded to give effect to the thing itself — as Deeds in Conn.t, it is a universal rule that record evidence is absolutely necessary to be introduced in proving it. But where recording it is not absolutely necessary to the existence of the thing itself, other proof besides record evidence may be admitted, as marriages & births in Connecticut. both are required to be recorded & both may be proved by other evidence.—

Where witnesses are made Deft.s in the suit to prevent their testifying, the mode of proceeding is for the Attorney on the part of the Deft.s to move the Court to hear all the evidence against such ~~witnesses~~ Defendants in the first

place, & if there is none, the Court will erase the names of such & they are good witnesses. — 2 Bac. 287. —

But if there is only slight or a little evidence against them the Court will order a trial of such before the others are tried, so that the last may have the benefit of their testimony — We have thus concluded the general view. —

A particular view of the foregoing subject.

It has been observed in the general view first taken of this subject, that the competency of witnesses was to be tried by one of three rules — 1. Their Interest. 2. Their infamy, or thirdly by principles of policy. —

Of Interested Witnesses. —

The interest which excludes a witness must be a pecuniary interest — No bias arising from relationship, friendship, or intimacy will amount to this interest — Still however witnesses in some cases are excluded from principles of policy, on the ground of the relation in which they stand to one or both of the parties. —

I. Baron and Feme. —

2 Rd. 616. The husband & wife cannot be witnesses for or against each other — These are not excluded on the ground of Interest, for it is an established principle that an interested witness if not objected to, may testify if he chooses — Whereas the husband & wife

are not allowed to testify, altho both should consent & there should be no objections. — 2 Hawk. 431. 1 Salk. 280. Hardr. 264.

2 Rol. 685. Brownl. 47

To this general rule there are some exceptions. They may swear the peace against each other, and be good witnesses in such a case ex necessitate rei. With necessity of the thing, is an operative principle to admit many witnesses who would be otherwise excluded. —

2 Hawk. 462

So when the Husband is prosecuted by the public for the personal abuse of his wife, she is a good witness against him or in his favor, & so vice versa.

But if an assaut & battery is committed by the husband upon her, is she an admissable witness? The first case of any consequence where this question arose was Lord Audley's & in that she was admitted. That was a case altogether sui generis. — Such an unparalleled outrage upon all the feelings of humanity was never committed, & the Page of history has never been tarnished with such a brutal and unnatural enormity!! And Lord Audley must forever stand alone an awful monument of human depravity. Therefore it is that the elementary writers pronounce this case not to be law, & declare that an extraordinary remedy was sought for an extraordinary, peculiar case. —

Hutt. 116.

1 Ient. 144.

Judge Reeve has never found a single decided case against Lord Audley's, tho. there are many obiter opinions of the Judges, contra. — 1 Gilb. L. E. 253

Ibid. 1 Ld. Ray. 28.

But there is a case in Strange where the principle is recognized as settled, & what is very singular without one remark. Judge Reeve presumes there must have been some case preceding this where it was settled, which is not reported. Otherwise there would have been some observations on this much contested principle, since Strange was a very accurate & able Reporter.—

1 Str. 633 Brown. 47.

2.dly It is laid down in almost all the elementary writers that the wife can be a witness against her husband in all cases of treason & they constantly refer you for this Law for to Lord Audley's case.

Brown. 47 Thay. 1.— Gilb. 253

Judge Reeve has examined that case & can find no such principles. But perhaps it might have been decided, & as there was no bill filed, this decision in the case was not reported. It is clear that no decided case which is reported recognizes this principle; & if it is admitted to have been decided in Russell's case still that decision is not entitled to much deference & respect; for it was made at the only time when party spirit ever harassed the threshold of Justice in Great Britain, & stained the history of their legal proceedings.—

2 J. R. 288. 3 Wendeson 288

She cannot be a witness if her testimony tends to criminate her husband

II. Of an Attorney and Client.—

Gilb. L. E. 276.

The Attorney stands in the same relation towards his Client as a Husband towards his wife with respect to whatever he is entrusted with by his Client.—

He is not allowed by the Court to testify as to this, altho' both parties wish it, & he is willing. But this disqualifi-

cation is confined to the knowledge which he obtains from his Client. for he must testify as any other person whatever he has acquired in any other manner.—

Suppose a Confidential entrustment is made to an intimate friend, but who is not an attorney, Agent &c & he is laid under an obligation to keept it secret, & never avield have been fully satisfied, had the Courts thought proper to have excused persons testifying — but the Law is otherwise — such persons are compelled to testify all which is entrusted to them. It was decided in Connt. that fudges to two.—

Are accomplices to crimes be good witnesses against their companions — They do not fall within either of the rules of Evidence above mentioned directly & are competent witnesses, altho their credit may be impeached by these circumstances. Sometimes from the circumstances they must be believed in spite of all their infamy.—

Of Interest in the Event and Question

II

Will 22. &c Where a person is interested directly or consequentially in the event he cannot be a witness. The difference between an interest in the event, & an interest in the question has been remarked ante.—

Interest in the Event or witness is either direct or consequential.— Wherever the judgment to

he recovered is immediately of itself to affect the witness in a pecuniary view his interest is direct. But where the judgment only lays a foundation for another suit or can be improved as evidence in favor or against the witness, his interest in the event is consequential. — So where a Guardian brings the suit in the name of his ward, he has a consequential interest in the event, for he is liable for the Costs incurred in the suit, to the opposite party, & they may be recovered out of him. —

Gilb. 235. An Interest in the Question, is where A beats B & the Grand Juror prosecutes him for a breach of the peace. In this case B can be a witness, for this judgment can lay no foundation for his suit, nor can it be given in Evidence in the private suit, & that he is interested to prepossess the public mind against A by his conviction before his suit is commenced goes to his credit & may always be shewn —

So if a Common Informer prosecutes the lender of money for taking Usury, the borrower of the money can be admitted to testify, for he has merely an interest in the question. —

It may be laid down as a General Rule that any interest in the event of a suit excludes a witness. —

To this there are several exceptions; particularly where a civil action is brought against a tort feasor his accomplice may be a good witness — Yet he is consequentially interested in the event as a judgment against one Joint-

feader is a bar to an action against another for the same trespass. As where A & B beat C, & C is sued, B is a good witness in the cause ex necessitate rei.

Formerly an interest in the question did sometimes exclude in Great Britain, & at others not. But as no reason could be given for this distinction, it is now abolished, & it never excludes. The old rule was, that if this witness in a civil suit was interested in the question he was excluded; but if a witness in a criminal suit was interested in the question merely, he was admitted. Law is tenacious! to be more careful of property than of character, liberty & life.

This discordant practice of excluding ~~interested~~ persons interested in the question prevailed at one time throughout the U. States. The U. States Courts in the southern districts of the Union immediately after the old rule was abolished in England, decided likewise that no interest in the question merely should exclude. But in the middle Circuit the old rule was retained; tho it was also abolished in the Eastern districts. The Superior Court of this State about two years since, adopted the present English rule, that no interest in the question merely shall exclude. And so have the Courts in almost all the States throughout the Union. The Supreme it is still retained in Pennsylvania & New-jersey.

Even under the old rule some witness interested in the Question in a criminal suit were excluded

4 Burr. 2251.

as in Forgery, Perjury, & Uttering. But Lord Hardwicke in Burrow broke up at once all these distinctions & the new rule was established in the leading case of Bent & Baker in Term Reports where it has ever since remained without contradiction, that no interest in the question should exclude a witness. — 7 T.R. 60. tho' the money not paid

3 Term. 27

The modes of proving witnesses interested in order to exclude them from testifying are ~~two~~ two. —

1. By an examination of other witnesses to prove it — or

Hawk 95 § 2. By examining them upon their voire dire.

Either of these modes may be adopted, but not both in any case whatever. For it would certainly be improper when you proposed the last method to introduce other witnesses to prove that one of your own was perjured. And it would impugn the great general or rather universal principle that no man shall impeach his own witnesses — But P. Reeve sees no reason whatever against examining the witness upon his voire dire after you have endeavored in vain to prove him interested by the testimony of others — Neither impeaches your own witness nor leads a witness into a snare by pretending to rely on his testimony — Yet it is settled law long since established, that it is a reciprocal choice, & that if you adopt the one you cannot take advantage of the other. —

Hawk 295 § 2.

The general rule that all persons interested directly, or consequentially in the event of a suit are exclu

ded from being witnesses, is subject to many important Exceptions.

These are all founded on one great & leading principle, the necessity of the thing.

This principle never works an exception, except where the objection goes to the competency of a witness on the ground of interest in the event of the suit.

1. The first exception to the general rule is wherever a stat. rendering certain persons liable in damages to persons damnified in certain ways clearly could not be carried into operation without admitting the party injured to prove the damnification. In all such cases he is admitted tho' directly interested in the event. As where the Statute of Winton in Eng. giving persons robbed an action against the Hundred in certain cases, could never recover of the Hundred unless admitted as witnesses, without they had been robbed in company. Therefore the person robbed has been admitted to testify against the thief in order to give effect to the statute. So the party from whom any thing is stolen in this State or in Massachusetts may be admitted to testify against the thief, altho' by the Statutes in these States he is entitled to treble damages.

There is a distinction however to be observed between these cases & those where the action is brought by a mere common informer. In no case is the party admitted to testify

for this cause, except where the action is given by the Statute to the party damnified — And a Common Informer is never admitted altho' the Statute should be defeated. —

It has been said that the Supreme Federal Court of the U.S. States have excluded the party himself from testifying in all such cases, & so have infringed this English principle. But this is a mistake since the case which they determined was where a Common Informer sued and offered himself as a witness, & this is perfectly consonant with the English distinction. —

There is not a single case to be found in the books to that effect.

At Com. Law there is one set of cases where it is difficult to perceive how the principle of law can be carried into effect without admitting the party to swear. Viz, where the goods of a guest are stolen at an Inn. The Inkeeper at Com. Law is liable, but the guest alone knows the quantity stolen. Yet there is no case in the books where he has been admitted. — Mr G says the party cannot be a witness in this case.

2. It is mentioned as another exception, that where a father sues one for debauching his daughter, she is admitted to testify against the Def.t from the necessity of the thing — But this is not the principle for she is neither interested in the event nor the question as she can never sue being particeps criminis & is therefore in legal contemplation a disinterested witness. —

3. Where the Sheriff of a County is sued for suffering a voluntary escape, the Escaper is a good witness against him altho' he is interested consequentially in the event from the necessity of the thing. — N.B. if the Creditor recovers of the Sheriff neither he nor the Escaper Sheriff can come

upon the Escapee, & otherwise he can. — See Buller Nisi Prius, Title "action on the case." —

4. On the same ground ex necessitate rei whenever rescuers are sued by the Sheriff, the person rescued is a good & competent witness against them —

5. On the same principle, the Deft in an action of account is admitted as a witness, for this is supposed to be an entirement from the Plft to the Deft which he cannot shew how he disposed of & accounted for, unless admitted to testify. —

6. In Connecticut by a Statute are the parties admitted to testify in Case action of Book debt on the same principle, altho' they proceed in other States without it. —

7. And the Plft in an action for a private assault is also admitted to testify in this State by Statute. —

8. Another Com. Law exception, is where joint wrong-doers are admitted to testify for the Plft in an action against their companions, & no objection on the ground of interest will avail any thing altho' they are interested to saddle their companions with the guilt —; for one judgment on a tort is a bar to any other action for the same. —

9. So also Agents & Mediators are good witnesses ex necessitate rei in an action between their principles — As where A sends money by B to C, & then is sued by C for the debt, he may introduce B to swear to the delivery of it to C, altho' C loses his cause he is exempt from the payment of the money and is therefore directly interested in the event. But if a receipt had been taken by B, he cannot be admitted, for his

testimony is not the best evidence the nature of the case admits of. But as the Law never requires a Receipt, & if none is taken, he must be admitted from necessity.—

10. Members of Corporations were formerly sometimes admitted as witnesses in Eng where the Corporation was interested & sometimes not, according to their respective interests. If their interests was great they were excluded: if trifling they were admitted to testify.— This fluctuating & uncertain rule prevailed in Great Britain until by a series of Statutes the degrees of interest to exclude are more definitely ascertained & nicely delineated.—

In Conn.t our Courts admit members of Corporations only from the necessity of the case & never where other testimony is ordinarily to be had.— In accordingly in this state, the Inhabitants of towns have been admitted where the town was interested.—

11. The Agent of a Corporation appointed to manage the suit had been excluded without any reason whatever, but that he is too spirited commonly.— This indeed is a novel reason for the exclusion of a witness. but it has been acquiesced in.—

12. Whenever persons have become interested subsequent to the commencement of a suit by their own act, this will never deprive the party of the benefit of their testimony, if they are
1 Hawk 134. good witnesses notwithstanding. But if their subsequent interest arose fairly & honorably, or by the act of God they
Ha 406. are not witnesses— As where J. S. took a Note witnessed by his two sons & died before it was collected, the sons

Evidence.

Agents & Go-betweens.

Lex Merc. 414. The mere agency of a man will not preclude him from giving testimony in favor of his principal
1 Esp. N.P. 326. for to incapacitate a factor as a witness it must be proved that he is interested in the event of the suit;
11 Mod. 226. should he, therefore expect out of the money received
2 Esp. 735. to receive payment of a debt due to himself, it is
3 Wils. 40. an insuperable objection to his evidence; tho' if he be only to have a commission on the business it is no obstacle to his being examined.—

Whenever a man is equally liable to either Pltff. or
Lex Merc. 414. Deft. the event of the suit is indifferent to him, of course
2 Esp. 665. he is a good witness.— Gilb. L.E. 246.— 7 T.R. 481.—

Where A. receives money from B. to be paid to
7 T.R. 480. C. on a question whether A. was the agent of C. or not, A. may testify.— In the sale of lands the rule does not hold good. Lex Merc. 415.— 1 Esp. N.P. 90.—

As to the general doctrine of evidence in mercantile concerns. See Lex Merc. 415 ff.—

A person is not a competent witness to impeach a writing which he has subscribed 1 Term 296. 1 Esp. Rep. 289. Days Rep. 17. Contra 5 Co. 60.

were appointed Exrs & succeeded to the Estate, the execution of the notement be proved in another manner since neither of them can be witnesses to prove the execution.—

13. So a servant is admissible as a witness in an action brot. by his master for beating him per quod servitium amisit & it is said on the ground of necessity— But this is not so, for the servant is not interested in the event directly nor consequentially, & it is in these cases only that necessity works an exception.—

Sha. 414. 592. 2 do. 944.

Peculiar Cases of admission of Witnesses.—

14. Whenever a title has passed through several hands, they may all be liable, one after another, as in case of several buyers & sellers of a horse— or any one of the persons may be liable— as in case of Covenants respecting land which passes through a variety of hands— In either of these cases all the persons are excluded from being witnesses— for they are all interested in the event.—

A question has arisen whether the grantor of a quit claim deed can be admitted to testify in a suit respecting the title to the land? The whole question turns upon this,— Is he liable? He certainly is not on any covenants in the deed, for it contains none, & it is on this ground alone I presume, that our Courts have admitted him.— But we ought to go further, & enquire whether he is not liable to refund the money in case the grantee is ousted of his title; for if he is liable he is not admissible.— This liability

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must vary with the various cases, & I apprehend depends upon this distinction — If the sale was a bargain of hazard & the purchaser bought at his peril, & without the use of any fraud, the Grantor would not be liable to refund, & of course is a good witness. — But if on the contrary he has sold land pretending that the title was good when it was bad to his knowledge — or has sold mere moonshine for a fertile soil of his own, & the grantees title is disputed, or if he is evicted, the grantor is liable to refund & of course is so consequentially interested in the event as to be an incompetent witness — Our Courts seem to have passed over this species of liability in their consideration of the question, & have therefore admitted the grantor in many cases very improperly — In all these cases parol proof must be admitted to prove it a bargain of hazard in order to admit the Grantor. —

5. We have a Statute in Connecticut rendering Garnishees liable to be summoned as witnesses in a suit against the Principle. It has been made a great question who is he a witness for? And it was first decided that if the Creditor chose he might rely upon other witnesses to prove the garnishees liability & thus exclude him. But upon a more mature consideration of the statute, it has been thought that it was made as well in favor of the garnishee as the Creditor, that he might shew how he had disposed of the goods of his principle & thus clear himself — And it is now settled, that altho he is neither a Com. Law

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nor a Chancery witness: yet he is a good Statute witness in this State, & in every other where there is a similar Statute.

As to admitting witnesses in Chancery the Rules are the same as in the Courts of Law with the one remarkable difference — That in Chancery either party has a right to appeal to the conscience of his adversary & compel him to disclose whatever rests in his own knowledge — but this can never be at Com. Law. — Yet in this case the party does not stand precisely on the same ground with a witness: for if the former does not disclose, it is taken for a confession — whereas if a proper witness does not testify, he is imprisoned for a contempt of Court.

And in this case there is a difference between the English & Connecticut Law — By the latter the answer of the party is conclusive as on a Voire dire, & no testimony to impeach his, can be admitted, since he is considered as the party's own witness — But by the English Law this answer is not deemed conclusive & the other party after answer is made may proceed to adduce other proof, altho' it directly impeaches the answer & proves the party swearing, perjured. —

The English law judge these considerations as the best calculated to arrive at the truth & prevent perjury, which is the pole star of all judicial proceedings.

But in this State the party requiring a disclosure may afterwards waive his appeal to his adversary's conc-

science of entire his waiver on the record & then resort to other testimony to make out his case.

Where a witness is interested equally for both parties as where he is liable, yet either prevail, he is a good witness, for he is supposed to have no bias in favor of either.—

If a release of all his interest is given to the witness by the party to whom he will probably be liable, in ordinary cases where he loses his cause, he is admissible. And altho' he should refuse to accept of it, being opposed to testimony, still the party shall not be deprived of his testimony by this but may tender a release & lodge it if refused, with the Clerk of the Court for his witness — when he may compel him to testify.—

II. Of Persons legally Infamous.—

Persons who have been convicted of some crime amounting to the crimen falsi are inadmissible or incompetent witnesses in any case.—

This crime is any one which goes directly to impeach the integrity & common honesty of the person so convicted, as a member of society and as a man.—

This is the only crime generally speaking which will exclude a witness.— And the conviction works the infamy & not the punishment in any case. for the last has not the least possible effect upon the person as a witness.—

In all such cases the Record of the conviction must itself be produced as the only proper evidence to induce the ~~Conviction~~ Exclusion.—

Of the Operation of a Pardon— How they would operate in an different States I Reeve knows not— but hopes the English rule would not obtain in ~~any~~ every respect.—

The Rule in G Britain is, that in many cases where a pardon is obtained from the Crown, the punishment is not only taken off, but the stigma of the crime, so that the person can be a competent witness— The distinction which has obtained between the cases is this; If the incapacity of the witness is the consequential result of the judgment merely, and not a part of it, the pardon eqenerates or

Cardinal.

renovates the offender —

But where the incapacity of a witness is a part of the judgment itself by statute as in perjury, the Pardon will never restore him to the condition of a good witness. —

This pardon is always considered an act of mercy & the person pardoned as really guilty. — for it never proceeds upon the ground that he has been convicted unjustly by the Court & Jury — How then can it ever renovate the Criminal & make him a good witness? —

Tho' of a Pardon once proceeds upon the ground of an improper Conviction it places the supreme magistrate over the heads of the Judiciary in legal proceedings. H which never was tolerated in any well regulated community where a vestage of liberty was to be found. — Hence it has always been deemed improper in such communities & as an infringement upon the liberties of the people for the chief magistrate to arrest the progress of a cause sub lite by a — Nolle prosequi — (Yet has the Chief Magistrate of the first Country on the Globe audaciously presumed to issue a Nolle Prosequi against law & against the Constitution to arrest the arm of Justice from imposing a righteous penalty upon one of his Minions, & to arrest the blow which the equal Justice of free Laws had aimed at this menial Son of Infamy — Jefferson & Duane let their names go to posterity together & let America blush!)

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In Cannt. we have adopted a new principle of purging the infamy of such a conviction by a long course of good conduct — If the life of such an one for a long series of years is not tarnished by a blot nor a blemish the Court has said in two cases that this does away all the presumption arising from the record of his being incompetent — This principle tho' novel appears to be very satisfactory & useful. —

There is one crime which seems to be an exception from the general rule respecting the crimen falsi or a species of the crimen falsi and which excludes the person convicted of it — viz Barratry at Com. Law or a stirring up of suits by pettifoggers &c — The law disqualifies Barrators ~~at~~ from being witnesses, but there is no Statute which has imposed this punishment. —

III Of Persons excluded from principles of Policy.

There are 1st Atheists (respecting whom see the General View) — Tho' it may be worth our while to observe further, that it is of no consequence what is the Character of an Atheist in society — Altho he is the most honest & exemplary man he still must be excluded for he cannot be under the sanction of an oath which is absolutely necessary. —

But it has made a great question in the Inferior Courts of many States in the Union. Some before the Supreme Court of Maryland whether universalists who differ

from Winchester & believe with their Leader Huntington, that there are no future rewards & punishments can be admitted to testify, or not — I hope the question will never come before the Courts, but believe that no such person can be excluded from testifying on sound principle — For tho his belief weakens his testimony, yet who shall say that he does not add a sanction to his ~~oath~~ testimony by an oath who appeals to his maker & the Creator of all things in whom he believes — Judge Reeve does not feel prepared to exclude him. —

So also Villeins were formerly excluded in Eng. — But before this state of vassalage was abrogated & their situation meliorated they were admitted as witnesses.

So also slaves are admitted in the Union except where particular statutes ~~of particular~~ exclude them. —

So also Pagans are now admitted to swear in all cases, tho they were formerly excluded, but they must be sworn according to the solemn ceremonies which are adopted among them. —

6 Dit. 6. 2 Kaw 434.

2. Idiots, Lunatics &c are also excluded from principles of policy without a question — No remarks respecting such persons are here necessary. —

3. Infants under a certain age are excluded for want of discretion — as in the last case — Respecting these there is no settled rule — Judge Reeve has never found any case where a question has been made about admitting them above 12 years old unless their education has been remarkably deficient — Nor has he found any case where a witness

Gilb L. E. 275

has been sworn under the age of twelve years. — Between the age of Nine & Twelve the Ct. usually enquire of a Child of learning whether it is able to know any thing respecting the obligation of an oath or not — and admit or reject him accordingly. —

Sta 700

Frequently the simple story of a child is told & has been admitted, altho' not under oath — This is a peculiar case. —

H.C.P.C. 634, 5

4. — Quakers have been excluded from testifying in any case in Eng until a Statute admitted them them in civil causes — Still however they are excluded in all Criminal causes to this day. — Such a shameful, such a disgraceful Law has never blackened the annals of America from its first settlement to the present time; for in this country they have always been admitted. —

Gilb. 265.

Miscellaneous rules respecting this branch of Evidence.

1. The best evidence the nature of the thing will admit of is always required — Thus if a Note or Bond is sued, it must be proved by the subscribing witnesses, & by no other testimony. This rule was formerly rigidly adhered to, but of late it has been relaxed, & if the witnesses are dead, you will now be permitted to prove it by other testimony. —

In Cases our Courts always admit the parties own confession of the executing the writing as the best evidence, & as superseding the necessity of calling the subscribing

witnesses — Tho. Judge Reene believes this not to be Law in Eng. do our Courts have admitted other ~~witnesses~~ testimony than the subscribing witnesses, where it appears that they are at a very great distance from the Court. — But we have no settled rule, each case depends on its own peculiar circumstances. —

There are cases where the Law requires certain evidence to a transaction which has not been obtained, that the party may as well suffer a non-suit, as proceed after having commenced his action. —

But where the party has obtained other evidence, which is admissible, but not the best is case would admit of, he may proceed to adduce this, it will merely operate with the Jury against his right of recovery, on the presumption that the better evidence behind, makes against him. —

2. The evidence adduced must go to the issue — or in other words, the testimony must be relevant, or it will not be admitted — Still however if the testimony is relevant, that is, goes to the issue, altho' the issue is wholly immaterial, still it must be admitted — as where in an action of Slander for calling the Pltff a Liar and a justification is pleaded — tho' the issue is immaterial, still a witness who would swear to the Pltffs lying must be admitted, since his testimony is perfectly relevant. —

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Of Hearsay Testimony. —

It is a General Rule that Hearsay testimony or that which one has said without being under the sanction of an oath cannot be admitted. —

But what one has said while under oath may be testified by others on two or three occasions. —
1. — When the person so saying cannot be brought to the Ct. or his testimony cannot otherwise be obtained — as if he is dead &c — Or at a great distance from Court —
2. When it is introduced to impeach what the same witness declares in the present cause. — Or where it is introduced to corroborate his present testimony, where it is impeached by the opposite party. —

Again. The confessions of a man against himself have always been considered admissible & as the best possible evidence. — But these are confined to facts, and whatever ~~that~~ the party has inferred respecting the Law &c from certain acts ~~confessed~~ cannot be given in evidence — As where one had confessed himself guilty of perjury this was not admissible, but if he had confessed that he had sworn one way when he knew that the truth was the other, this would have been admitted as a good confession against himself. —

So also the voluntary confessions of a Criminal before a Magistrate against himself have been deemed good evidence; but as the Magistrate has no power to obtain these, if any act,

Evidence.

It has been solemnly determined that in a criminal prosecution you may give notice to the Deft. to produce a paper in his possession; and in case he neglects to produce it, you may give other evidence of it — 2 Durf. & East. 201.

3 Wood. 325

If a man destroy a thing designed to be evidence against him, parol proof of the contents may be given in evidence

2 Roy. 731.

Woodeson. 725

Proof that a witness has confessed himself interested in the event of a suit, is not sufficient to disqualify him. But where it is proved that the party by whom the witness is introduced has acknowledged him so interested, the witness ought not to be sworn. —

4 Mass. 487.

cunning, or fraud was practised in obtaining them, or if any threats or promises were made for this purpose all such confessions are inadmissible.—

To this General Rule there are likewise several other Exceptions.

1. Hearsay testimony may be introduced (as was observed in the general View) to prove the boundaries of Land — 2. To prove a mans death by General Report when he has been absent a great number of years.— and 3. To prove the general Character of witnesses.— This is confined merely to their character for truth & veracity & no other enquiry can be made respecting them.— Some have supposed that this question refers to his truth & veracity as to his legal engagements.— But on the contrary it refers to the reliance which the world in General & not the witnesses, place in him when he tells a story — Whether it is as much or as great as is place on men in general —

In certain cases questions may be asked respecting the general Character of the party, tho' it is generally true that you cannot enquire — This is only when the party himself puts his Character in issue by his plea or declaration. — And where the quantum of damages to be recovered depends on his general Character, or where the right of recovery rests upon it.— In these cases the parties General character may be enquired into.— to where A sues B in slander for charging him with stealing the sheep of C.D. — the Deft may prove that he is a thief — for the purpose of lessening damages.— Or where Bonds

are given to a kept Mistress in consideration of past cohabitation, at Law these are void as founded on an illegal consideration — But Chancery will enforce them in all cases where the Deft. seduced her as premium pudicitiae — But if she was a prostitute before the Deft. gave the Bond or cohabited with her, such Bond will be void even in Chancery — If therefore such a bond is sued, the ~~ground~~ general character of the Pltff. is put in issue, and is an essential enquiry. —

But this general proof is confined in all such cases to the species of crime with which the Deft. has charged the Pltff. — Thus in the action above mentioned between A & B, it would not be proper for B to attempt to prove the Pltff. guilty of Forgery or adultery &c — Tho. in Root a case is reported where in slander for charging the Pltff. with Perjury, the Deft. was permitted to prove him a thief; but it was on the ground of its being a species of the crimen falsi. — Yet this was extending the principle very far. —

Miscellaneous Rules. —

Regularly no witness can be introduced to swear to a writing except the subscribing witnesses. — This rul Judge Reeve considers very unreasonable & rigorous. — 3 Burr. 1244.

It was formerly Law that no person should be allowed to testify to his own turpitude or baseness. — But this is now permitted. — Still if the witness is about to confess himself guilty of a crime which will subject him to punishment, the Court will acquaint him with the consequences. — But if he there

shooses to proceed he cannot be stopped. — On this principle is a Mother allowed to swear her Child a Bastard, tho. she cannot be compelled to. —

So also may a person who is a naked trustee having the legal title, but no interest in the suit, be a witness — As the Judge of Probate in Connt. whenever his bond is sued — here he appears upon the record as ~~witness~~ Plfs. of the parties are generally excluded on the ground of interest. — But the reason does not operate in this case & therefore he is admitted. — 1 Gilb. L. E. 225. — See Peake's Evi 149 —

Hardr. 358. 1 Atk. 229 P. W. 239. Stra 506. 548.

Of the Number of Witnesses.

Generally no particular number of Witnesses is required in ordinary cases by the Eng. or Connt. Law. — And there ~~was~~ never was a time when the Law of G. Britain or Connt. required more than one witness to swear directly to the point in issue, as circumstances equivalent have always been deemed sufficient. —

But by the civil law, two witnesses were indispensably necessary to the establishment of any fact. — And this rule has been adopted by many of the European States. —

Why it did not prevail in Eng. must be attributed to the circumstance of being tried by twelve Jurors from the neighbourhood, & to the idea that their knowledge would usually be equivalent to the testimony of one witness — but the single witness under the English Law must be credible or his testimony will avail not in the Court. —

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There are several Exceptions to this General Rule —

1. In Eng. where the answers of Defendants in Chancery may be impeached: the testimony of a single witness will avail nothing in impeaching him: but there must be another to the principal facts, or there must be circumstances equivalent to the testimony of another witness in order to impeach him. —

2. In proving Perjury in a Court of Law, two witnesses are necessary, an oath will stand against an oath. —

3. So also it is said that in Eng. two witnesses are necessary to prove Treason — But if there is one witness direct & circumstances attending, proved, which are equivalent to the testimony of another, this is sufficient — And tho they go to prove different overt acts, still this makes no difference. —

I know not how it would be in this Country. —

In all other crimes the testimony of one witness is sufficient in England. — A Bond having been executed by A. & attested by one witness was carried into an adjoining room & shewn to B. who was desired to attest it also, which he accordingly did in the presence of A. Held that B. was a good witness to prove the execution

2 Bos & Pul. 217

Books N.P. Cas. 146.

Of Compelling the attendance of Witnesses. —

The first process is by a subpoena or summons, which will usually bring them to Court — But if not by this merely, the Party must tender them the legal Cost for travel & attendance the first day, & if he refuses to come & the cause suffers on the trial through want of him, provided this summons is returned into Court with the Officer's doings thereon, & he is called three times & does not appear, he is liable for all the damages sustained on account of his absence. —

Or in case he refuses; the party may procure a Capias to be issued from the Court attaching his body, & bringing it before them. — And if he eludes the Capias he is liable as in the last case. —

If the witness refuses to testify after he is brought into Court, the Court will imprison him for a contempt, during the session of the Court but no longer. —

Where it is necessary that the witness should bring certain documents, a summons issues with a duces tecum requiring him to bring them if in his power — as where a town Clerk is summoned & his Records are necessary. —

Of Depositions. —

It is a General Rule in Eng. that depositions are never used in a Court of Law, & that they constitute the only testimony in Chancery. In Conn^t. we use depositions & viva voce testimony promiscuously

in our Courts of Law & Courts of Chancery. —

Still these are admitted in the English Courts of Law if the parties agree to it, & they almost universally do whenever the Court recommends it — as in cases of witnesses. But if it is objected to by either party it cannot in any case be admitted — since it is there no legal exhibit, as it is in Connecticut in a Ct. of Law. —

But where an issue is directed out of Chancery (since Chan. never tries a point of fact) depositions which were taken for the Chan. Court are read to the jury in a Ct. of Law yet here no new evidence is introduced. —

In Conn.t the Court as a Court of Law try the facts or send the cause to Commissioners appointed in such case & not to the Jury.

In Eng. & in Conn.t no deposition is ever admitted in any Criminal case, tho the parties both agree. The witnesses for a prisoner in a Criminal prosecution are always summoned at the expense of the State, if he is unable to pay them. And on any suggestion of his Counsel that any person is a witness, the Ct. immediately order him summoned.

As to depositions in Connecticut, our Courts of Law have guarded them in every possible manner from fraud & corruption. The requisites to a good deposition in this State are 1. That it be sworn before a Magistrate — 2 That it be drafted by the Justice who swears the witness, the witness himself or some indifferent person chosen by him & not by the party or his at

torney – 3. That it be sealed up by the Magistrate before it goes from his presence, to prevent tampering with it & altering it – 4. That this deposition be brought into Ct. sealed, & there opened in Court – 5 That the witnesses deposing live more than twenty miles from the place of holding the Court, or rather not within twenty miles. – 6. That the opposite party be notified of the time & place of taking it, or if he has an attorney nearer than he is, if the party know it, he must be summoned, if the party is not, or indeed he must be first. –

The 5th Rule holds generally both in Eng. & Coun. – but there are some exceptions – as where the witness is sick & unable to attend Ct. in person, or where he is about leaving the State before the Court, or where he is not amenable to the process of the Ct. – as living on the boundaries of another State, tho' he is within twenty miles, yet may his deposition be taken in either of these cases. –

But if there is any the least fraud or deception or trick about it, the deposition will be rejected – as where the party procures the witness to ride away twenty miles & neglects to take ones deposition until he has got away &c

It is now settled that a deposition once taken in a suit between two parties may always be improved in all suits between the same parties, but no others. – This rule applies equably well to G Britain & Coun., & so do the following --

10 W. 700. 268. Sha. 920. Where a witness gives a deposition while his character was good & afterwards it becomes infamous, still it may be read. So where one has given his deposition while a

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disinterested witness & afterwards becomes interested, it would seem the deposition ought to be read on every principle, but the current of authorities is against this, & all such depositions are held inadmissible. —

10 W. 700
2 Vern. 101.
Stra. 920.

Witnesses cannot be arrested in going to Court nor in returning from thence, nor while they continue there, provided they consume only a reasonable time. — The case is the same with suitors. — They are in justice entitled to this protection from the Ct. because they ~~cannot~~ cannot shelter themselves in their own castles, & otherwise the parties would be deprived of their testimony

This right of protection is the same in Eng. & in Conn.

The English mode however differs from ours, of granting it. Since by that, the witness must go to Court without any protection, altho after he has arrived there, a supersedeas is granted him, or a writ from the Court signed by the Clerk, prohibiting all Sheriffs from serving process on the witness. — But an arrest while he is going to Court, by the Sheriff cannot be false imprisonment unless he has a supersedeas & then it is — The last has been a great question in England.

By the practice of Conn. the witness has a protection procured for him by the party desiring his testimony, before he leaves home. It is false imprisonment to arrest him when he shews this.

17 Ver. 513.
4 Com. 274
2 W. Bl. 1113.
1190
Salk. 544.

There is no analogy between the English cases & ours, because there the witness has no supersedeas going to Court — This question has been argued three times before the national Court in this State before Judges Fowell, Cushing,

Contempt.

Blair & Chase, & it was finally decided by Judge Chase to be false imprisonment in the Sheriff — Indeed there is such a position in Jenkins Centuries, a valuable, but rare book.

To arrest any person in the Court house or near it or as some authors say, "in the view of the Court" is a Contempt of Court. —

The modes of examination is this.

The party who calls a witness to establish any point, has right usually to have the examination first before his adversary cross examines. And that side which has the affirmative of any question always first proceeds to prove it. —

It is a general rule, that positive testimony is always to prevail over negative — No rule has been more abused & less understood with reasonable restrictions, since negative testimony in many cases ought and must prevail.

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Of Written Testimony.

Written testimony is of several kinds, but is is usually ranked under but three distinct heads. — 1 Records. 2 Sealed writings or Specialties — & 3 Writings not sealed —

I. Of Records.

Records are of two kinds Public, as the memorials of Legislatures or Courts of Justice &c — & Private as Records of Deeds Levy of Executions &c tho' the first only are records strictly speaking. —

1 A Public Record when adduced is conclusive testimony & nothing can be introduced to control or rebut it — The only proper plea & answer in any case, to this is a Bill of Record which denies its existence. —

As Records must remain in the custody of the Court, Copies of them are good evidence, authenticated by the certificate of the proper officer who keeps them, & who is under the sanction of an oath to certify true Copies alone. — If he cannot be obtained the Copy may be certified by the Judge of the Court, who in Eng. omen & affixes the seal of the Court; in Court he certifies & seals it both. —

If neither a Judge nor the proper officer can be obtained, any indifferent person may take the Copy, but he must swear to its correctness in Court, or by deposition. —

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General Statutes are not to be pleaded or adduced in evidence regularly as the Court notice them ex officio. There is however an exception or two as. 1. Where Court a Stat. goes to vacate a security it must be pleaded specially as the Stat. making void all usurious contracts — & 2. — Whenever one is indicted on a Statute, which has been meliorated in its rigor by a subsequent one — If he would take advantage of the subsequent one, he must specially plead it. —

Private Statutes must be pleaded specially & spread upon the Record, since the Court are not supposed to be acquainted with all these, & they must be certified by the proper officer, to be authentic evidence. —

In Counts we always give them in evidence under the general issue. —

The laws of another State may be adduced precisely as private Statutes of our own — And the printed Laws are good evidence when they are printed under the sanction of the Legislature. —

Where there is no Statute in another State respecting certain transactions but an existing Law — it is presumed to be the same with the Com. Law of G Britain — But the Judges of their Courts or eminent Lawyers may certify that it is different & this is good evidence. — This practice has gained very generally among the New England States — but where the Law has been proved to be different repeatedly, the Court will not enquire respecting it, but pro-

ceed upon it as completely ascertained — as where it is generally known in Court that the interest of money in New York is seven pr. cent per Ann. the Court will take this to be the legal interest without enquiry. —

Histories, also, where necessary may be adduced
Salk. 281. to prove certain facts which have taken place, but these can never be used to establish a particular right. —

So also Heralds books are good evidence to prove a pedigree in G. B. — Tho' not so much reliance as formerly is now placed upon them, as they have become corrupt — We have no such thing in this Country. —

— Almanacks are also good evidence in many cases, as to ascertain the rising of the moon on a certain night &c which may be very important in certain cases. —

Family Bibles &c are good Evidence to prove the birth marriage or death of persons where they are recorded & they are usually very correct & plain —

A verdict in a former suit is sometimes adduced as evidence; but in all cases it must be very slight —
5 Mod. 316. for the testimony may be very variant in different cases. —
Earth. 79.

It can never be adduced however in any case unless it
3 Burr. 1243 is between the same parties, depending on the same right & to the same point. —

The amount of the verdict is merely the opinion of twelve men respecting the same point. —

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2. Private Records as records of Deeds, Levy of Executions &c

In cases of Public Records a Copy is good evidence, but private Records, as Deeds cannot be introduced as evidence by a Copy in Eng. in any case as a General Rule. Not even in the Counties where they are required to be recorded — These are not necessarily confined to a certain place as public records are — if tho' the contents of a deed of those alone were disputed might probably be proved from the Record, yet if the evidence was denied, this cannot be annually ascertained except from the deed itself. —

To this rule there is an exception where the person claiming under a deed cannot be supposed to have it himself. as one holding under an execution In such case the Copy from a record will suffice — This principle applies duely to an mode of acquiring land in Comm. by levy of an execution. — If the title is disputed, as no deed can be procured by the Levying Creditor, he may procure a Copy of the Defendants deed from the Records —

The same principle enable the Deft. or Pltff. to produce a Copy where the Deed has been burned or destroyed, viz, that it is out of his power to produce it — But this must be very clearly proved to the Court. —

As to the Law in Connt. Whenever the dispute is between the original grantee & Grantor, or any other person of the original immediate Grantee the Deed must be produced under which he claims, & a Copy will not suffice

But he is not bound to produce the deed of any other person — as in England — to illustrate the rule — A conveys to B, B to C & C to D — Now in Eng. if C disputes D's title, he must produce all the Deeds from A down to himself — Since in Eng. all the title deeds are delivered to the Grantee in a conveyance of land — and he is always presumed to be in possession of them. — In Connecticut tho we proceed on the English principles of requiring all the deeds in the party's power as the best evidence the case admits of — still he is only required to produce the deed of his immediate Grantor, if he may resort to the Records for the copies of the other title deeds, ex necessitate rei, since in Connecticut all the title deeds are not delivered up — The practice is fraught with a great variety of evils — But in this, as in many other parts of our Law Communis error facit jus. —

When Bonds Deeds &c are produced & denied, they must be proved to have been executed & delivered, by parol testimony. In the first place the subscribing witnesses & no others must be called if they are living, as the best evidence the case admits of — since they were specially requested to attend: unless the party has confessed the execution of it, which supersedes the necessity of any proof besides. — But if neither of them can be procured, other witnesses may be called who saw the execution or delivery — and if these are wanting, it may be proved by inference from circumstances — as the hand writing &c of the Maker or Grantor. —

The evidence of a delivery may arise from a great variety of circumstances & need not be actually delivered &c as a deed to

be good. — Even possession is prima facie evidence of a delivery, tho' it is liable to be rebutted. The admission of parol proof to control a writing, or vary its terms, or annex a condition &c is never proper — but merely to establish certain facts from which the intention of the parties may be infered — as in an absolute deed in given form ~~to~~ of to B, no parol proof is admissible to shew that it ~~was a mortgage~~ a contract was made that it should be a mortgage — but to shew certain facts as that the grantor has continued in possession ten years & received all the rents & profits, parol proof may be admitted, from which the jury might infer that it was intended as a mortgage. —

The consideration expressed in the Deed is not conclusive between the parties as to the quantum, tho' it is as to their being a consideration, for the quantum of the consideration expressed is wholly immaterial as to the validity of the Deed. — But as against third persons as Creditors, a consideration expressed is not conclusive as to its existence, as they may prove no consideration was ever given & they upon the land as belonging to the Grantor their debtor. —

A Bond may be delivered as an Escrow i.e. to a third person for another's benefit, to be delivered over on the happening of some contingency or event, then to be the person's act and deed. — As a general rule it cannot be delivered to the Grantee to be the act & Deed of the grantor on the happening of some event, and otherwise not; but it will vest the property in him absolutely. Can it be delivered to the party himself under any circum-

stances as an Escrow? On this subject there is great confusion in the Books. But Judge Reeve believes the books can be reconciled on the principle that when the act required to be done is concurrent with the delivery of the bond & considered as to exist at the same time, it may be delivered as an Escrow to the Grantee. As where a Bond is delivered to a person, if it is expected he will pay the money at the same time. Here it ought not in justice to be considered as delivered unless the money is paid & on this ground was the case in Cro. El. 835 decided. But others say that the title vests immediately, since no condition of this kind can be attached to this writing. & that in case of such a fraud the party has his remedy otherwise. This seemed to be decided in Cro El 520 & 884. But as the same Judges determined these cases, & the other without assigning any reason for the apparent difference, we must suppose they took the distinction laid down now, between cases where the condition was concurrent with the delivery & where it was not, but dependent on a future event.

Cro E 835
520.884.

Many contracts are necessary to be proved by a sealed instrument & parol proof is inadmissible because nothing but the sealed instrument can ever prove the contract. As where a sale of Land is necessarily by Deed, no parol proof could possibly prove the sale.

So in case of writings not sealed in some instances parol proof is admissible, in others not. But when admitted it cannot be adduced, if it is opposed to the writing, since it must stand well with that. And it is only ad-

mitted where an ambiguity arises from something extrinsic & foreign to the writing; or to explain equivocal terms which were used: to rebut an equity, or to enforce a right in Chancery. —

Evidence.—

Of giving Verdicts in Evidence.—

4 T.R. 590 Where the master has been subjected in damages in consequence of the negligence of his servant, the verdict may be introduced as evidence in an action by the master against the servant.— See the Law upon this subject in Gilb. L. E. 32. ff.— No Record of a conviction or verdict shall be given in evidence but where the benefit may be mutual, i.e. where either party could introduce it, provided it made for him Gilb. L. E. 604.—

Writs of Error.

2 Bac 187. 3 Bl. 407. Jenk. 25. 2 Inst. 4. A Writ of Error is a Commission to Judges of a higher Court to examine the record on which Judgment was given in the Court below & to affirm or reverse according to law.—

Writs of Error are of two Kinds — The first & principal kind are taken upon errors in Law, & are for the purpose of correcting mistakes in point of Law which happened in a lower Court.

The second kind are Writs brot. upon errors in fact, & may as well be brought before the same Court as any other. But the consideration of these is reserved for a future occasion.—

1. Of Errors in law. These must appear on the face of the Record — & the writ must be brought to some Court superior to the one which rendered Judgment.—

2 Bac 315. 1 Com. 286. 5 Com. 286. It is not material how many mistakes the Court make, there can be no reversal of their Judgment, unless these appear on the Record.— Therefore a question of Law is made, & a judgment is rendered thereon, as it appears on the Record of the Inferior Court, a writ of Error always lies but whether successfully or not is a very different question.

No question of fact can be tried on this writ, & no testimony can be adduced. As if the Deft. should demur to the declaration as insufficient, & it should be adjudg-

sufficient here the whole question appears on the Record & a writ of Error lies. — So if there is no pleading but a default & judgment is rendered on an insufficient declaration, a writ of Error lies. This is sometimes beneficial but it is a dangerous experiment. —

So altho no writ of Error lies upon an issue in fact, yet if any interlocutory judgment is rendered wrongly during the trial, this writ of Error lies — as if a witness should be offered & the Court should reject him where he was competent. yet no writ of Error lies for this, unless the matter is reduced to the record; which is done by filing a bill of exceptions stating the facts &c and then it becomes a part of the Record, & a writ of Error lies. —

1 Rol. 749.
2 Bac. 199.
19 Ind. 455.
3 Peck. 308.
Latch 133.
1 Sid. 184.
do. 466.

It is a rule which holds universally true, that if there has been error committed, or claimed to be committed upon rendering Judgment on interlocutory questions as excluding a witness, or overruling a good plea in abatement, no writ of error can be brot until the conclusion of the suit. — For this reason the party ~~tesifying~~ taking the writ may indeed obtain the cause on the merits, & therefore will want no writ of Error —

6 Term 766.
2 Hob. 267.
299.
Cath. 124.

It is a general rule subject however to a few exceptions that if the Deft neglects to plead in abatement matter proper for an abatement, altho this all appears on the record still no writ of Error lies

The exceptions to the last rule will be noticed hereafter. —

The object of a judgment on writ of Error is to restore what is lost — if to be proper it must answer this great end. —

2 Bac. 216. 2 Keb. 129 Barnes 376. 1 Lev. 280. 4 Bac 672, 3 1 Bac 212.

Writs of Error are usually taken out with a bondsman. The principle of the English Law is, that if one takes out a writ of Error without a bondsman, this should not serve as a supersedeas, & shall not stay the proceedings. — But a Statute was made in G. Britain that a Bondsmans was necessary, to this writ. — Same now in both Countries whenever whenever a Bondsman is on this Writ, it operates as a supersedeas. —

The object of the Bond is rather to find surety for the costs, or for the good behavior of the Plff. — But for the purpose of securing to the prevailing party in the Court below all which he ~~shall~~ can & shall lose by or in consequence of the writ of Error. — On the Plff. in Error might defeat this prevailing adversary by praying out a Writ of Error & staying the process & absconding —

To this Bond no defense can be made. On this the Bondsman is not only liable for what costs have accrued by his staying the judgment, but for the Interest on the Judgment also. —

The form of a Writ of Error is extremely simple. It merely summons the Deft. to appear before the Court, to hear read the Writ, process & Record of the cause if in the Court below & the Errors therein contained in the words following viz^te It then declares that manifest Error has intervened, & the Error must be assigned ~~as~~ (but it may be assigned as

general as possible) & the demand is that this court is not for the reversal of said erroneous judgment & the recovery of what he has lost thereby — which sum is not less than — Dollars &c &c — and the recovery of damages, is the judgment below with the Interest thereon. —

There has been some question when the Writ of Error operates as a Supersedeas, & the Rule established is this, — When the Judgment on which the writ is taken is executed, the writ has no effect whatever upon it — but until the Writ is executed this writ operates as a Supersedeas.

4 Bac. 670. 684. 1 Vent. 30. 2 H.B. 237. 2 H.B. 372. 2 Rol. 491.

Now if the property of the party is levied upon & sold before the Writ comes, there is no question but that the writ is inoperative. But suppose the property is levied upon but not sold at the post as the Law directs before the Writ of Error is taken out & served. It then unquestionably operates as a Supersedeas — since the Judgment is not executed within the meaning of the rule, until the property is sold, the money collected & applied to the execution. —

2 Bac. 210. 211. 370. 4 Bac. 381. Yelv. 6.

The writ of Error becomes a Supersedeas of the execution in the officers hands by a copy being delivered to him.

4 Bac. 670. 684.

But where the body is taken on the Execution, the judgment in all cases may be considered as executed in the eye of the Law — as much as if the money was paid — So that this writ does not ~~of~~ release the body or operate in any manner as a Supersedeas.

The General Issue to a Writ of Error is this. "Nothing Erroneous" —

The English Courts of Error are the Common Pleas to which Writs of Error can be taken in civil, but not in criminal diction — From the Common Pleas in all cases whatever writs of Error lie to the Court of Kings Bench — From thence they may be taken to the Court of Exchequer — thence to the Exchequer Chamber, & finally to the house of Lords. — Or they may be taken from the Kings Bench to the house of Lords directly — The Kings Bench however is the proper Court of Errors from all inferior Courts in Civil & Criminal Cases — And if the case originates in the Court of Kings Bench — the Writ of Error is taken to the Parliament. —

The Court of Exchequer was constituted merely for a Court of Errors; & all cases before which were decided erroneously in the Kings Bench were necessarily taken to Parliament, which was not in defaion frequent enough — & this Ct. was undoubtedly intended originally as the dernier resort — tho when this question came before the House of Lords, they determined that this Court could not oust them of their Jurisdiction — altho' the House of Lords is a defective tribunal in itself for the decisions of questions of Law, yet it has been well managed as a majority of them have always decided the questions before this house, invariably for this two hundred years without an exception. —

The Judges of the Exchequer are the Judges of these lower Courts which have not tried the cause as

if a cause was taken from the Kings Bench to the Exchequer Chamber, the Judges of the Court of Common Pleas together with the Lord Chancellor & would decide upon it.—

1 Rol. 774. 803. Cro. C. 442 5 12. 509. Vel. 47. 1 Salk. 262. Carth. 223. 1 Ver. 310.

The method adopted by the Courts in G. B. to enforce that great principle of restoring to the party what he has lost, is this. If the Jud.nt of the lower Court is affirmed, costs merely are awarded in this Court, but no execution issues anew, since the old one stands in full force, if in this case is not appealed by a writ of Error — The judgment of the superior Courts in such case is this according to the old year Books Quod judicium non ante fit stabere in perpetuam — This rule applies equally to our State as to the Courts of G. Britain. —

When the judgment is reversed in G. Britain, the Ct. above will render the same judgment which the Ct. below ought to have done, if it is consistent with the constitution of the Court — Thus if the Pltff. in the original suit brings error on the ground that his declaration in the lower Court was adjudged insufficient in an action of slander & the judgment is reversed in the Kings Bench, a Jury of enquiry will assess the damages, after the judgment of reversal has been rendered together with all the costs —

But if such a Writ is bro.t to the Exchequer Chamber, as there is no Jury to this Ct., if the judgment is reversed it must be remanded back to the first Ct. having a power where it was last tried, for it is not consistent with

the constitution of this Court to restore all which was lost according to the Rule *supra* — And this is the only object in remanding any cause back to the Court below for if in such case the Ct. of Exchequer should find that the declaration was insufficient on the Deft's taking the Writ after the Ct. of Kings Bench had found it sufficient, their Judgment would be rendered here & not remanded back, because they may as well restore what is lost as any other Court. —

If the reversal is on an interlocutory Judgment, as on a plea of abatement which was deemed sufficient in a lower Court — there the Judgment is a *respondeas ouster* in the Court of Errors, if it is consonant with their constitution — And here they restore all which was lost by abating the Writ —

But if the Judgment on a plea of abatement in the Kings Bench should be adjudged erroneous in the Exchequer, a *Respondeas ouster* would indeed be awarded, but it must be sent back to the Ct. it last came from in order to be tried by a Jury on the merits. —

In Conn.t Our Superior Court have adopted the English principles, but enforce them in a different manner. — Our Courts of Error are the Superior Court & the Supreme Court of Errors. — The first has exclusive cognizance of all errors committed by Justices of the Peace, assistants & Courts of Common Pleas — The last only tries the errors of the Superior Court — No writ of Error can be taken from the Judgment of a Ct. of

probate in this State, the appeals in the nature of Writs are taken, & the Judgment rendered in this is the same as on writs of Error.—

These Writs are taken to the Superior Court for every possible Error in point of Law.— And Mr Reeve thinks contrary to the intention of the Legislature — as they must have intended that the County Courts should be the dernier resort in many cases of exclusive jurisdiction — as respecting highways &c &c. — But the practice is now otherwise.—

In Const. a Judgment upon a Writ of Error operates as one upon a dilatory Plea, after which the Pltff may obtain a trial of the case upon the merits — and this whether the Deft. obtains the reversal of himself — He may in both cases try the cause in the higher Court as tho it were appealed.—

But if the Pltff. in certain cases after the Court have decided the question in error, should enter for a trial notwithstanding, he must be pursuing a Phantom — as if the Ct. should decide his declaration to be altogether insufficient. Thus suppose A sues B in the County Court, & offers an objectionable Witness to prove his Claim who is admitted suppose that B files a Bill of Exceptions, the merits of the case are then tried & A recovers £ 100.— B sues out a Writ of Error upon his Bill of Exceptions, & obtains a reversal — then it may be politic in — A to enter for a New trial in this Court notwithstanding the Deft. has obtained a reversal against him, for in all likelihood he will gain it on the merits.—

But where the decision is, that he never can recover, as where the declaration is wholly void of substance, it is ridiculous for the Pltff. to enter for a trial on the merits. —

And in this State writs of Error lie from decisions in Chancery, where the Error is apparent on the record as from decisions in Courts of Law. —

If the Ct. of Errors to which the cause is taken, can try & finish it, they will put an end to it — But if from the want of a Jury or any other cause, they cannot try it, they send it back to the Ct. from which it came —— Thus in our Supreme Ct. of Errors no damages can be assessed, & where these are necessary, the cause must be sent back to the lower Court. —

On a Writ of Error the Pltff. never recovers any costs in this State — But if the Judgment on the Writ is in favor of the Deft. in Error he recovers Costs. —

Our Law limits the time of bringing Writs of Error to three years after the Judgment. —

Of the Effect of a Reversal of a Judgment. —

This is materially the same every where. — If the Officer has taken the body, & the Judgment is reversed, he is not liable as a trespasser — for the Judgment tho erroneous, was good for all purposes until reversed — And the execution which issued upon such a Judgment uses a sufficient warrant for the officer. —

1 Ord. 778.
Yel. 179.
3 Com. 179.

If property had been taken & sold before the Judgment
2 Bac. 232, 2 was reversed, the party obtaining the reversal is barely
Yelv. 108. entitled to all that he has been damnified. — But sup-
Mod. 573. pose a favorite Yoke of Oxen are taken & sold to a 3d
3 Leon. 89. person at the Post: it is Judge Reeves opinion that
the Law did not intend that what he lost should be
restored specifically — Hence the purchaser would hold
8 Co. 19. 143. the Cattle, & the party must be paid in money. — This
Cro. E. 278. idea is founded in policy merely, for no person would
Mod. 573. purchase under an execution, if he could not be protected
Cro. J. 246. safely in the enjoyment of his purchase. —

But suppose we
1 Rol. 778. had a writ of Elegit as in Eng. in which the Cattle
8 Co. 143 were appraised & to the Creditor & not sold; in such case
Cro. E. 278. if the Judgment is reversed, the party takes back his
Yel. 108; 178 Cattle & not their value, since no third person is injured.
Crown. 107. But if the Sheriff sell property taken on Execution even to
2 Bac. 232. a stranger when he is not bound by law to sell it, this
1 Rol. 778. is restored by reversal. — as if goods of an outlaw are taken
5 Co. 90. by a Capias ut legatum, when sheriff is not bound
Cro. E. 278 to sell them but to keep them for the King
3 Bac. 778.

The Rule laid down by Coke is that Collateral things executed, are not divested by a reversal. But Collateral things executory are — So if one in Execution on the original judgt. escape & before judgment recovered agst. the Sheriff for the escape, the original action is reversed, the action for the escape is gone — Writ of Jud.t & Execut. had been obtained

(in the action for the escape) before the Judgment
8 Co. 142. reversed, then the Judgt. would remain notwith-
1 Saund. 88. standing the Writ of Error. — for here the collateral
thing is executed — But in the last case the Sheriff
2 Ban. 231. ought to be relieved by an Audita Querela. Bro. J. 646.

In Count. where Land is levied upon, the Judgment
Creditor takes possession. If the Judgment is reversed
the Title of possession is removed back, if not the value
of the land. —

But suppose when the Judgment Creditor ob-
tains possession that he sells to a third person — Shall
the Debtor on a reversal recover back the land of the Cred-
itor, or its value in money. — This question never has been
decided & now remains to make a great figure in our Courts.
It is contended on one hand that by analogy to the sale at the
Post the vendee ought to hold — But contra it is urged
that no principle of policy justifies it in this, as in that
case — Judge Brent think that the original owner ought
Middlesex not to be deprived of his property, & that the vendee should be
County — ousted — This question was decided Dec. Term 1805 in the affirmative
i.e. that the vendee must be ousted. —

Judgments may be affirmed & reversed in part
1 Ha. 189. only — tho' it is difficult, indeed impossible where the Judg-
2 Co. 86. 816. ments are entire. But where it is for two distinct things
4 Ban. 198. as for debt & cost, here it may be affirmed in part as to
199. 262. the debt & reversed as to the cost — This is the great
question can you divide the Judgment, & as where
in trespass the statute in certain cases allows no more

Cost than damages, if the Ct. should render judgment for so much damages & full costs, amounting to more than the damages — Here the Court of Errors would affirm the judgment as to the damages & reverse as to the costs — So in Judgment on our Statute of Bastardy — where the Court say that all the maintenance shall be recovered at once — So if husband & wife in G.B. suffer a fine & common recovery where the wife is a minor, this is void as to her, tho' good as to the husband, & this is the nature of a Judgment.

2 Burr 220
8 Co. 58
Rol. 759.
Cro. J. 211.

In Count. we have improved this distinction in one instance where it has not been in G.B. — to where A sues B & C for trespass — & C is a minor, if Judgment is rendered against both, the English Courts reverse it as to both — since C was not sued by Guardian — But Our Courts have affirmed the Judgment as to B & reversed it as to C on the most correct principles in my opinion —

1 Rol. 776.
Cro. J. 299.

When one Judgment depends for validity upon a prior one, the reversal of the prior one, has an effect upon the latter, but the last cannot be said to be reversed by the reversal of the first, tho' on this subject there is a difference of opinions — As if an Executor should be sued as dust & Execution should issue against the assets in his hands, — But if he did not pay in this case, we will suppose a scire facias to issue against the Executor himself de bonis propriis, here if the first Judgment is reversed this undoubtedly is a good ground for an Audita Querela

but does not reverse the last judgment —

And if the Execution in the last case has been satisfied after an audita Querela the money so paid can be recovered back in an action of Indebitatus Assumpsit — It is no objection to the action that a judgment has intervened, for this proceeds on the ground that something
1 Sid. 253 Palm. 187 arising since judgment was rendered, makes it inequitable for the party any longer to retain the money. If this is like all cases of assumpsit — As if one sued procures Bail, & execution follows a judgment against him, & is returned Non est — Here the Bail is liable, but if the judgment against the Principle is reversed — this is a good foundation for an Audita Querela in favor of the Bail tho, the judgment against the latter is not reversed by it. —

There is one set of cases where actions are brot. on Bonds conditioned for performance by installments — whenever the first becomes due, if the obligor fails, the penal-
8 Co. 143. ty on the Bond is forfeited, & the whole is recovered, but the
1 Roll. 777. Court will Chancer the Bond to what is due at the first payment & reserve the Bond in Court as a security for the performance of the rest — And upon a second failure, when a second instalment becomes due, a scire facias issues on the former judgment, & this also is collected — Now if the first judgment is reversed, there can be no ground for a scire facias — Yet a judgment upon the scire facias will not be erroneous, but an Audita Querela is the proper remedy for the obligor.

It is a common mistake with the Jury to find in many cases more damages than are demanded - If Judgment ~~is ren~~dered in pursuance of such a ~~judgment~~ Verdict, it will be erroneous. But the Plff. in all such cases may pay the consequences by executing a discharge of the surplus on the Judgment or execution. —

So where the cause of damages is certain fixed & definite as in actions on Notes or Bonds - if the Jury find more damages than are strictly due by the instrument, I have think this also must be released to prevent Error. . .

11 Co. 115. Moore. 281. Yelv. 45.

It might be otherwise where there is any reason for presumptive damages & for smart money - as in Trover, Slander, trespass &c. —

II. Of Errors in fact. Writs of Error of this kind are founded upon the supposition that a fact ~~in existing~~ dehors the Record, which renders the Judgment erroneous - As if Judgment should be rendered against a Feme Covert. or ag.st. a minor who is sued without his Guardian upon default - These facts however do not appear on the Record. - 3 Bac. 15 9:151.

36 Com. 177. 11 Cent. 207 5 Com. 354 286. Salk. 400. 2 Rol. 53. 3 Bac. 198. 218:217. 228. Carth. 122 179. Cro J. 510 1 Rol. 746 716.

If the Error be in the process - Error coram vobis lies for this is not Error in Judgment. F. N. B. 21. Rep. 181.

Thus when the Error in Law is occasioned by default of the Clerk of the Court, or Sheriff or other officer of the Court Error coram Vobis lies. — 1 Sid 208. Roll. 746. F. N. B 21

5 Com. 286.

This writ may be brot. & usually is in Eng. before the C.t which rendered the Judgment upon the Error in fact. Hence it is called a Writ of Error coram Nobis, in contradistinction

Sho Rep 59 5 Com. 286. ~~Carth. 86~~ Carth. 338 & 9

Writs of Error.

to those Writs but for Errors in Law which are denominated "Coram Nobis". This was not an practice formerly that it is now becoming quite common ~~now~~ in Connecticut.

4 Bac. 143. Formerly all Writs of Error of both kinds ~~was~~ were taken to a
Sho. 639. higher Ct. than the one which rendered the Judgment complained of — This was not a good practice as the County Courts may as well correct Errors in fact as any other Court in Connecticut. —

Of Assigning Errors. —

1 Rol. 761. It is a general Rule, that Errors in Law & Errors in fact cannot
1 Sid. 147. be assigned together — For all errors in fact if denied must
1 Vent 252. be tried by a Jury — But Mr Reeve see no objection to uni
Yelv. 58.
Carth 338. ting them as well as a Demurrer to one part of the Plead
Leon. 105.
Lye 32a ings, & the General Issue to the other part — But our
3 Com 177. late ~~mode of~~ practice respecting the mode of bringing Writs of Error Coram Nobis seems to prevent their being joined — & if they are joined it may be demurred to for duplicity — tho it is said that a General demurrer will reach the defect —

2 Bac 218. So assigning several Errors in fact amounts
1 Lev 6.
5 Com 300. to duplicity, or if several Errors in Law are assigned
F. & B. 20.

So also it is another Rule that no fact against the re
Salk. 262. cord can be assigned for Error, for the Record is conclusive
Cro. E. 63.
Lev 73. as to all allegations of facts which it contains — A Judg
3 Com 301.
Cro. E. 12. ment should be rendered in this manner J. S. by T. N. his
Cro. J. 568.
Hob. 264. Attorney &c. The party cannot assign for Error that T. N.
Ty. 89.
Cro. E. 439. was not his attorney, for he was dead two years before

because the Record is conclusive. He must seek some other mode of redress for the mistake. —

There has been much dispute whether if Judgment is rendered by one as a Justice — Error could be assigned on the ground that he was not a Justice having never taken the oath required by Law as a necessary qualification. — And if so whether this is not an assignment against the Record — On this question there are but six decisions reported in the Books — three of which are for the assignment, & three against it. — The question therefore remains sub Lite. —

1 Ld Ray. 184 do. 242.

There has been considerable discussion likewise on this question — Can a party reverse a Judgment rendered in his own favor? It is settled that he never can reverse the Judgment unless he can shew it was clearly to his disadvantage — And how can he shew this since no witnesses can be introduced to shew it? Judge Reeve declares himself very much perplexed with this question, & he finds no clear idea upon it in the Books —

5 Co. 39. 8 Co. 59.

Suppose the Case be an Error in Law, but the Plea such as to involve a question of fact — as if the Deft. in Error should plead that since the Judgment complained of was rendered, the Plff. executed to him a release of all suits Errors &c. — This is traversed & must go to the Jury if the Court has one — and the point of Law assigned as Error stands for an after consideration, if the defendants plea is insufficient — otherwise the Writ abates. —

1 Rol. 788. 1 Salk. 268. 2 Ld Ray. 1005.

Writs of Error.

A Diminution of the record, is where is where the Writ of Error recites only a part of the Record — and this is alledged — When the Court proceed to issue a mandate to the lower Court to certify upon the whole Record — and if it comes up certified — if it agrees with the present Record, then it avails nothing, but if it is variant from the record as ~~received~~ recited, it is substituted in its place, & the cause proceed ut supra.

As to the distinction between a Writ of Error and a Writ of Certiorari 2 Mass. R. 445.

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New Trials.

3 Bl. 388
1 Burr. 395.
Lev. 202.
6 Term. 638.

New Trials are granted on principles of Equity unembarrassed by the technical nicety of Law, and are governed by similar rules to those in Chancery.—

At present it is admitted that a power to grant New Trials resides in all Courts whatever of a general jurisdiction (as our County Courts in Conn.), tho' Courts of limited jurisdiction (as our Justice Courts) have no such power.—

10 W. 213.
5 Bar. 240.
3 Term. 131.
Strange 101. 995.
3 Bl. 387, 8
Salk. 648.
1 Burr. 895
3 Bl. 396.

How these originated is very uncertain, there is no Statute authorizing them — neither can they be derived from any Com. Law principles, but were most probably established by the Courts of Law without any restrictions.—

Hence were they so framed as to do substantial justice between the parties when one trial had & could not do it—

They were very rarely granted, until within one hundred & fifty years — so that the subject remained free from those shackles which the rigid ideas of those who administered the ancient Com. Law would necessarily have imposed upon it.—

1 Mod. 2.
1 Burr. 399.
2 Term. 4, 5
3 Bl. 391, 2
2 Th. 306, 7
1 Barlow 32 c.
Salk. 644, 8
7 Term. 469.

The great object of Courts in granting New Trials is to do substantial justice between the parties independent of all general laws, & in a State of Nature — Thus the verdict of a Jury in many cases may be contrary to Law, yet the Courts have refused to grant a New Trial, because that verdict effected substantial justice, tho' contrary to rigid Law.

New Trials.

In granting New Trials, the Court do not decide the cause in favor of the parties obtaining them — but merely gives them another opportunity to try their cause. —

Error is not predicable of the decisions of Courts in granting New Trials —

Kirby 41.

The effect of a New Trial is, to introduce the same cause into Court de novo — And all the former proceedings are eo instanti done away of as tho' they had never existed — as if Execution has been obtained in the cause on the first trial, of levied, of the property has been sold — Indebitatus Assumpsit lies immediately for the money as tho' no former Judgment had been rendered. — So if Land has been levied upon, of conveyed to a third person, the title derived under the execution is void — Indeed in every possible case, except one, does a new trial sweep away all former proceedings. This exception, is where property has been taken and sold at the post. it cannot be removed, especially from the bona fide purchaser, because that the principles of policy demand that third persons who purchase according to Law should be secured in their purchase

This general effect of New Trials of sweeping away all former proceedings, is fraught with a variety of evils — But the Court to have exercised a controlling power which prevents these deleterious consequences — Thus, they direct the party petitioning for a new trial to give sufficient security to the prevailing party in the first trial, that he shall acquire every thing if he prevails on the New trial, which he could have ac-

quired if it had not been granted — as if on the former Execution, the body of the petitioner for a New trial was committed to Goal — If this is granted he must give security to the adverse party that his body shall be forthcoming if he prevails in the New Trial — As this power is discretionary with the Court, they fix what terms they please to the grant. — and almost always they direct the petitioner to pay all the costs which have hitherto accrued. —

1 Mod. 2.
3 Bl. 392.
4 Co. 648.
3 Bl. 392.

Where a New Trial is granted to the Pltff. in the former suit the Deft's bail in the original trial is completely discharged. —

Court will not grant New Trials where there is no Equity in granting it, altho the Verdict was contrary to Law.

2. Where it would only tend to minister to the passions of men.

3. Where the object of it is to introduce a new defence, which is indeed legal — but opposed to the justice & equity of the ca. Nor

4. Where if the former division had been otherwise, it would operated merely as a punishment upon the party. — On this principle — that is improper to expose a person to punishment twice.

4 Burr. 2093
7 Term. 738.
5 Bur. 246.

Causes for granting New Trials. —

But Court will grant New Trials for many important & equitable causes. — As -

I. Where the Verdict on the former trial was contrary to Law — On this case there is no dispute about the facts in the case between the Court & Jury, but the decision of the Jury on those facts, is entirely against Law — Thus if A claiming under B should sue B in ejectment, & it should appear that B's Grace this

2 Mod. 309.
1 Salk. 446.
647. 648.
7 Term. 470.
2 Ra. 725.
Com. 402.

2 Bur 1216. 1 B.R. 167 deed while he was out of, & B in possession, which by our Law is void — If the Jury in such case should find for A the Court would grant a New Trial because this is contrary to law — Still however if no injustice is done by such a Verdict, the Ct will not even in this case grant a New trial. —

Some unaccountable circumstance has prevented our Courts in Connt. from granting any New trial for this reason, & the idea is entertained by many that they do not deem it a sufficient cause — But Judge Reeve declares that he is authorized to say that our Court would grant a New trial in such a case for they consider this a good cause. —

II Where the Verdict is against the evidence. — But in such

5 Bur 2427. 2 Ch. 1 Bur. 11. 322 2 Burr 664. B. N.P. 327. 2 Bl. 392. cases the Court is very tender of granting new trials on this ground — for it seems to be the exclusive province of the Jury to judge of the evidence. — But no cases as yet have been found where a new trial has been granted, except where there was none, not the least evidence to support the ~~evidence~~ fact; or if any so very slight that it could have no influence on a man of common understanding

And in no case will the Court grant a New Trial because the weight of evidence is against the verdict — For in Litchfield County where four Witnesses swore positively & directly agt.

2 Sha 1140. a single witness, if the Jury found agreeably to the testimony of the individual, the Court would not grant. — Yet a new trial is never granted altho the verdict was entirely contrary to the whole evidence, & against Law, provided that the Court are convinced that substantial justice has been done by the

former finding

III. — Where excessive damages have been given by the Jury. — Judge Reeve has been favored with a view of all the cases even tried on this point, amounting to one hundred & seventy and but three new trials were granted upon them all — and one of these is unsupported by no reason in the books. — This proves that for this cause new trials are very seldom granted, indeed. Even in all the Wilkes's cases not one new trial was granted, tho very high damages were given, & altho. the Courts felt in no way disposed to favor John Wilkes & his adherents. —

Com. 17.
2 Wils. 444.
2 C.4.205.
205.252.
3 Wils. 18.
Styles 462.
2 Wils. 62.
2 Sha. 691.2.
1 Term 277.
1 Term. 277.
4 do 659.
5 do 257.
1 Burr 609.

It is very difficult to lay down any rule on this subject with precision & certainty — Judge Reeve however presumes that the Court will never grant new trials for this cause unless the conduct of the Jury in finding the damages is such as will justify the the Court in inferring gross partiality in them. — This is the best rule which he can lay down. — In K. Bk. 387. 5 T.R. 257

5 Burr 250
2 Term. 5.167.
3 Wils. 18.
5 Term. 257.
5 Com. 155.

IV. — Where the damages given by the Jury were too small. — In all the cases of New Trials in the books not a single case is reported where the Court have granted in case of a tort. — But in actions ex contractu where the damages are necessarily certain, if the damages given are too small this must arise from some mistake & partiality in the Jury. —

Sha. 140.
940.
2 Sha. 1051.
1 Sha. 425.
1 Salk. 647.
1 Burr 332.
2 do 366.
5 Burr 248.
1 Burr. 354.
Salk. 647.

V. — New Trials are sometimes granted for misplead ing — By this is meant, that where the defence made is a bad one, when the party had it in his power to use a better one — But this cause is operative only with certain

5 Burr. 251.
10 Mod. 202.3
3 Burr 1385.
2 Term 134

qualifications. — Viz. The party must state not only what was mis-
pleaded, but the defense which he wishes to improve, & must
6 Mod. 22, 222. show that the last could not have been given in evidence
Salk. 643, 5. under the issue joined in the former case. — Then if the
Court upon enquiring into it find it all frivolous, they deny the
New trial. — But if a distinct defense is set up this must be
expressly stated, & testimony must be adduced to show
to the Court what can be ~~provided~~ proved — and if it is rea-
sonable, the Court in such case will grant a New Trial.

But where the party pleaded in bar where he ought
to have pleaded the General Issue he shall not be denied
a New Trial. — As if A sues B for a direct assault, & it
should be pleaded that one witness was present — If the Pltff.
should reply that he was infamous, & on a demurrer judg-
ment should be given for the Pltff. — There a new trial will
be granted in order that the Deft. may plead the General
Issue — when his special plea in bar fails him & when
in fact it is presumable that he was not guilty as if there
was no assault. &c. (i.e. a Demurrer should be overruled and
the cause thus go out, a new trial might be granted in
order to have a trial on the merits which the Demurrer pre-
vented — But this depends upon the circumstances of each
case — for if the Demurrer was frivolous & the Court will not
grant a new trial. —

VI. — Another cause for a New Trial is New discovered evidence
12 Mod. 84. 12 Mod. 5-84. 5 Bur. 2652 In the English Books the cases for New Trials for this cause
are very few, because the petition must be brought forward

so soon after trial in the English Courts, that there is very
Salk. 293 little room for the discovery of New Evidence. Still it
1 Wils. 98. is such a reasonable ground for a new Trial, that I presume
5 Bur. 252. it frequently obtains in the English Courts altho' the
1 Term. 84. cases are not reported. But in all the U. States, partic-
Tho. Raym. 194. ularly in Connecticut — New discovered Evidence
5 Bur. 152. is the great & principal ground for granting New Trials.

But agreeable to the principles of policy (not of Equity) it is a rule that New Trials shall never be granted for New-
5 Bur. 252. discovered Evidence, if it might have been discovered & had at the former Trial by using due diligence. —

Neither will a new trial be granted because a Witness whom the party introduced at the former trial forgot a most material fact
5 Bur. 252. which he now remembers; or did not relate it to the Jury —
3 Bur. 352. In such cases principles of policy & general Equity prevail
5 Bur. 252. over the particular equity of peculiar cases. — For if the Witness were allowed to come in again after perceiving what was wanted to make out the case, perjury & fraud would walk erect in our Courts of Justice — How he most dangerous! —

In Court the party in this case states in his petition the whole trial, the issue on which it — that he has since discovered new & material testimony from such a witness, that this witness is P. S. & that he will swear this & so — The Court will then enquire of the witness what he will swear, & if it is as the party states, they will

grant a New Trial.

The testimony adduced at the former trial will not be heard on the new, for the Judges are supposed to know that — But if the whole Court should be changed at once, this rule must be dispensed with.

VII. No new trials have been granted where a Judgment has been obtained against one party without a trial, either by fraud obtaining, or by the false return of an officer &c &c.

5 Bac. 241. 1 Salk. 646. 3 Bi. 391. 2 Lev. 140. 1 Sid. 235. Salk. 428. 435. B.N.P. 327.

In Eng. the Nisi Prius Judge files his report of the case and on the day in Banc he reports it, which is a conclusive statement to the whole Court — so that no testimony is admitted — If the Nisi Prius Judge reports that he is satisfied with the first trial, there is no instance in the books where a New trial has been granted. —

VIII. New Trials are granted for some mistake, defect or misconduct in the Jury. — As if the Jury should cast lots to find a Verdict — or if one of the Jurors is interested, or if he should converse with one of the parties about the suit &c &c. —

5 Bac. 245. 7 Mod. 54. 1 Vent. 30. Stra. 129. 5 Bac. 250. 188. 291. 2 Lev. 140. Stra. 642. Salk. 645. Bro. C. 189.

In Eng. this cannot be ~~done~~ made a ground of arrest as it is here in Court. — In this State therefore if the party knew of the interest of the juror in time to ~~allege~~ challenge him, no new trial will be granted for this cause. —

As to the Law respecting the conduct of the Jury upon Trials — Vide — 5 Bac. 287: 251: 291: 281: 290: 282. 3 B.C. 375. 6 Com. 14. — 1 Vent. 125 Dyer. 218. 12 Mod. 111. 1 Leon. 132. 2 Ray. 148. Cro. Cart. 227. Mo. 33.

The Jury may sometimes mistake — The Judge Reeve throws off but one case in the English Books of this cannot

apply here. — The mode of returning a Verdict in Eng. is for the Clerk to ask "what say you Mr. Foreman?" & he answers "for the Pltff. to recover" &c & the verdict is not written in G.B. as in Court. — In one case the Jury after some hesitation found for the Pltff. — But the foreman in returning it said the Deft. which was immediately accepted & recorded without a discovery of the mistake — In this case a new trial was granted. —

IX. New trials are granted for some mistake in the opinion, or some defect in the Judge of the Court — This has

5 Bur 2471. 545. 1 Mod 119. 6 Mo. 642. 7 Mo. 53. 64. 10 Mo. 202. 282.

been very much agitated in G.B. — but it certainly is a reasonable cause — As if the Court have misdirected the Jury — if this is now settled in Court. — So in Eng. New Trials have been granted where the Court admitted improper ~~evidence~~ testimony & no bill of exceptions was

B.N.P. 327. 1 Burr. 717.

filed — So it is certainly proper where the Court are conscious of having of delivered a wrong opinion, & this last has obtained in Connecticut

X. — So if the Counsel have been guilty of misconduct or a mistake — New Trials have been granted — as where improper

Salk. 645. 10 Mod. 202. 3 Burr. 1385. 2 Burr. 134.

testimony has been admitted by the Counsel without an objection, & afterwards its irrelevancy is discovered, a

5 Bur 251. contra 10 Mod. 202. Salk 643. 6 Mod. 22. 222.

new trial will be granted the party — But where the Counsel does not attend to the cause & goes away on the day of trial &c. no new trial will be granted for it is the party's fault to employ such Counsel, still however an action lies against the Lawyer in such a case

for his negligence. —

XI. New Trials are sometimes granted when the witnesses summoned were absent at the time of trial — if sometimes not — Such an absence however is no ground for a New trial — if it is merely stated that they would not come — since there would always be exclusion & fraud, if this were the Rule — In this case the witness may be sued for not attending — or if he takes refuge in his poverty & refuses to attend, the Court will will issue a Capias to bring him by the Court & suspend the trial in ordinary cases until he can be had. —

11 Mod. 101
5 Bac. 262
Salk. 645
6 Mod 22
1 Ent. 30
1 Burr 322
Sha 691.
1 Wils. 98.
2 Mod. 22.

If however the Witness is arrested by the adverse party or by him seduced away from the Court — or if he is prevented from attending by a sudden accident or sickness, the Court will grant a new trial; provided the Witness makes affidavit of what he could swear, & in their opinion it is material, & on no other condition will it be granted for this cause. —

5 Bac. 253
10 Mod. 141.
5 Bac. 252
Salk. 645.

XII. If a cause has been lost by the testimony of a person legally infamous, a New trial will be granted in Equity. — There is some difference in the books on this point — The last cases decided proceed on the ground of neglect & carelessness, in not taking advantage of it at the trial & adducing the Record when it was known at the time — In other cases where the fact was not known at the trial, or the party was surprised by it, Judge Reeve presumes a New Trial would be granted by the Court. Salk. 647. — He knows of no case in the Books, where mere incompetency in a witness, who

1 Ser. 717
Salk. 653.
12 Mod. 584.
2 Atk. 13.
19
Sha 691.
Bl. R. 298.
5 Ba. 352.
5 Com. 152.

ought therefore not to have been admitted, was urged in affirmance of a New Trial — But he thinks it ought to prevail if in one case he prevailed in Connecticut for this cause. —

Salk. 647.

XIII. New Trials have been granted where the Jury have found a general Verdict, when directed by the Court to find specially. — This is not illegal conduct, for the Jury are not bound to find specially. This direction is generally founded on the application of one party or both, if if the verdict be against the opinion of the Court, a New Trial will be granted. —

Hardw. 23
7 Mod. 37.

A New Trial in such case has been refused, but because it was after a trial at bar, in which New Trials were not easily obtained formerly. —

XIV. New Trials may be granted from the peculiar circumstances of the case — There are but two cases in the books which prove this principle — The first was where the party demanded of his adversary to produce a ~~Writing~~ writing which was material as he had a right, provided he had given notice previously — The party objected to producing the writing, which made against him, on the ground that he had had no notice of this detained his case — Here the Court granted a New trial on the ground that he had unjustly recovered by a species of legal finesse & trick — The other case was where the Deft. challenged that the ~~objection~~ obligation was obtained from him by fraud & insisted also that it was vitiated by forgery — On the trial the whole drift of the Counsel's arguments went to shew the forgery under the General Issue & the Jury overlooked the fraud & gave a verdict for the Deft. Here

1 Burr 352.

1 Burr 390.

the Court granted a New Trial, as the Jury had overlooked the main object, viz, the Fraud, & had founded their verdict on the sole ground that there was no forgery.—

XV.— Misconduct of the parties — as treating the Jury, or of his Counsel, or any wrong influence, or any kind of Embracery is another good ground for a New Trial — Vide — 11 Mod. 141. 5 Bac 292. — Mod. 452: 5 Bac 252. 5: 2 Vent. 173: 41 Mod. 119: 1 Vent. 12: 4 Bl. 140. —

Embracery is an attempt to influence the Jury corruptly, to one side, by promises, persuasion &c. 4 Bl. 140.—

XVI

New Trials.—

Cases where the Court will not Grant New Trials

2 Lev. 97. 1 Sid. 131. Salk 649. 7 Burr. 2100. 3 Bar. 387. 6 Mod. 22. 5 Com. 155. Cha. 691.

It is laid down in the Books that a New Trial will never be granted after a New Trial — But this is not ~~true~~ Law — The position has of late years been acknowledged untenable. — Still however it has been contended that a third New Trial could not be granted — This also is not Law — for the Ct. are not bound to any specific number of times in these. —

They may as well grant a thousand New Trials, as one says

2 Wils 244. L. Mansfield in Burrow & will in certain cases so often as the Jury oppose the Court. — Still however if it rests on a question of evidence, it is presumed the Court would not grant several New Trials, but leave this as within the province of the Jury. —

6 Term. 638. 1 Show. 336. 1 Salk 446. 1 Lev. 9. 1 Sid. 153. Cha. 897. 1238. 1 Wils. 17. 3 Wils. 59. Cha. 1238. 5 Burr. 254. Salk 646. 12 Mod. 9.

No New Trial will ever be granted on the part of the public in a Criminal prosecution — This rule however has one exception — If the Criminal in such case has practised fraud on the former trial, a new one will be granted — Another exception is where the arguital is a nullity by the misconduct of the Judge in point of Law. —

1 Show. 336. 1 Lev. 124. 5 Term 20. 4 do 753. Contra 2 Roy 63. —

But on the part of the Criminal if he has been unrighteously convicted, a New Trial will be granted. —

1 Wil. 329.

2 Str. 484

The above rules apply to all Qui tam actions where a penalty is to be recovered — & to all penal actions indeed to all actions whatever where the judgment shall operate

as a punishment. — 4 BR. 753. —

The question remains to be agitated in this State if to make a figure in our Courts at some future day. Whether the Court will grant the Deft. a New Trial to prove usury, after he has once pleaded it & failed? —

There is no case of this nature in the Books, nor has it met with a judicial decision in Connecticut — But the Court in one instance said if the question was not before them, they should not have granted one — & Judge Reeve thinks they never aught to grant a New Trial, because first —

1. The object of our Law was to do justice between the parties, & not for the sake of the Deft. — Now the Plea goes to oust the Pltff. of his whole demand, as well that which is equitably due, as the remainder. — But this is administering to the corrupt passions of men for the purpose of evading the Laws, which is very improper. —

2. This plea operates upon the Pltff. as a public ~~prosecutor~~ prosecution, & since the Deft. in case of a Public prosecution can never be put twice in jeopardy, the Pltff. in this case surely is entitled to the same privileges. —

3 Pb. 59. 60 — It is a rule in G. B. that four years acquiescence under the
3 Wodeson 356 — first trial is an effectual bar to a New Trial. — But in Eng. there is no Statute of limitations. —

In Conn. a Statute of 1804 limits new trials to three years after the first — provided
Dan. 995 — the grounds of the petition there was discovered. Since this time refers to & runs from the time of at which the grounds of the

New Trials were discovered of to this alone.—

1 Burr 277. New Trials are not usually granted in actions of Slander.—
5 Bur 2550. But there is no law against granting them in these cases—
1 Salk. 644.
2 Jones. 200.
3 Styles. 452.

So no New Trial is granted for any defect in the proceedings which you might have challenged on the former trial.—

It was formerly holden that New Trials were not granted in actions of Ejectment, because they were not conclusive
5 Bur 2553. But the Rule now is, that New Trials are as readily to be
1 Dan. 225.
Salk 648
650. granted in these actions, as in others, if the Verdict be for the
Stra. 1106. Pltff., tho. not so, if Verdict be for the Deft. except for very
1 Burr 323 particular reasons; for when Verdict is for the Pltff. it changes
4 do 2224. possession; otherwise when for Deft.

In Connecticut new Trials may as well be granted in all such cases as in any other whatever.—

In England where one of two Defts only is found
1 B & P 326. Guilty, & seeks a New Trial, the Court very rationally refuse him
3 Salk. 362. one, if the one acquitted objects to it, because they hold that a New
12 Mod. 275. Trial, revives the ~~the~~ case generally as it stood before, against
Stra. 814. both defendants, & it is a hard case to subject the acquitted one
6 Burr 638. to a ~~new Trial~~ another trial But in Connecticut we hold that there is no necessity for reviving the cause against both & that a New Trial may be granted in favor of the one convicted, & the rights of the one acquitted shall be no way affected by it, & the Cause shall stand with only one Real Deft. This is more equitable & just.—

New Trials.—

New Trials are never granted to plead the stat. of limitations — for this is considered an inequitable Plea. —

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General Observations upon Real Property.

Real property as distinguished from Personal Property (says Judge Reeve) is a difficult matter precisely to define. Real property, however, is immovable, as houses, lands &c; but it is not true that all personal property is movable, for a lease of lands for years is immovable as real property; altho' it is true that the lease can be carried about in ones pocket. — But the grant is the property; something which cannot be moved. — Again — real property as lands & houses can be tread upon & lived in, but this alone is not real property, for an equity of redemption is real property, & cannot be lived in or tread upon. — But further it is said that all property which descends to the heir upon the death of the owner, by the law of the land is real property. but if it will go to the Exr it is personal property; but this is not a complete definition; for a life estate does not go to the heir; & it is real property. If is a free hold estate. can an Estate to a for the life of B go to the heirs of a upon his death, B still living? it cannot; because it is only an Estate to A, & not to his heirs. It cannot go to the Exrs because it is a freehold Estate. The donor cannot take it because he granted it out for the life of B who is still living. — Who then can take it, for it seems "it has not where to lay the sole of its foot" — It was open as in a state of nature to the first

Real Property.

[illegible] until the Statute of Car. 2d which directs the Exr to sell it for the benefit of the heir.

There are 3 kinds of Estates known to the English law, which Estates have certain unalterable properties & incidents 1st Estates in fee simple. 2 Estates Tail. & 3 Estates, or for life, of which there are several: as an estate to one for his life, an Estate to one for the life of another; also estates resting on contingencies are generally ranked under this head.—

Real Estates may not only be acquired in houses lands & equities of redemption, but in some incorporeal hereditaments. Corporeal hereditaments is the legal idea of lands. It is in fact land itself, & has a grant of land, has every thing ab inferis ad superis for cujus est solum ejus est usque ad coelum. An incorporeal hereditament is something issuing out of a thing corporate, which is neither tangible nor visible — as a right of way, a right of fishing, a right of office, a right of common &c.—

From what has been said it would seem that every Estate, not in fee simple, fee tail, or for life would be personal property & go to the Exr; but there is an Estate which ~~would~~ is, & as would appear neither real nor personal, which is an Estate at will. It cannot go to the heir; it cannot go to the Exr. It must then on the death of either of the parties be at an end

[illegible] Estate, [illegible] must be some words

of inheritance, which in England is the word "heirs." How is this, for to make personal property inheritable it would not be necessary? Originally the Northern nations poured in upon the Roman Empire, & brought with them the seeds of the feudal System. The Chiefs of those hordes had at first, no idea of giving out any other Estates than those at will. Afterwards Estate were vested for a longer time. - Estates for years were then granted out. The tenants were unwilling to rest here, they were both to part with property after they had made improvements upon it. It afterwards became a principle that they should hold the Estates for life, but no one then thought of a longer Estate. - Hence an Estate given to Thomas not being mentioned for years, was construed to be an Estate for life. After this sometime, the tenants became anxious to have their Estate descend to their families after their - and for this purpose it was necessary in grants to use the word "heirs" to distinguish a descendible Estate, from one for life only. Hence the word "heirs" was rendered essential & has been continued ever since. -

Reeve in treating this upon the nature of Estates, conceives it unnecessary to cite authorities; for every elementary writer is an authority. It is however unnecessary to enter into all the old feudal ideas. - Blackstones Commentaries on this subject is recommended as the most perfect outline. Some further historical observations will be made on the nature and properties of real estates or Real Property. -

Real Property then is governed by rules altogether different from

what it was under the wreck of roman Empires. When the Northern Nations (before spoken of) broke in upon the Western & Southern nations a more permanent respect in lands was desired. It was in the first place customary for the chief-men to grant it out upon the condition of the fidelity of the grantee.— These persons (as has been mentioned) afterwards held it for years, then for life, & afterwards it was made descendible.— Grants were then made to the Barons & their "heirs" The word heirs included every future direct descendant, but the grantee must have been of the blood of the first purchaser or acquirer, for at that time, a man could have no collateral heirs; and if the first acquirer had no ~~heirs~~ children, he had no heirs; for children only, could be heirs.— The eldest son in case of children, took, and upon his decease his brother inherited, not as heir to him, but as heir to his father, as being of the blood of the first purchaser. During all this time there was no alienation of Land, i.e. denying & selling it for price. But when money was wanting to fit for expedition to the Holy Land, it became customary for the purpose of raising money. It was at first customary to sell only a small part of ones Estate in land. It afterwards became customary to sell half, & finally by the Statute of Quia emptores 18th Edw 1st— a man was empowered to sell the whole of his lands. Still lands could not be devised by Will until the Statute of Wills 32 & 34 Hen 8th— which made all Lands devisable.— It may not however be unnecessary to remark that heirs thereto, land itself could not be devised; but

the use of it could i.e. a man could devise lands to the use of another, which doctrine Courts of Equity favored & enforced. In consequence of this devising to uses, the Statute of Uses 27 Hen. 8th was enacted, which declared that he to whom the use was devised should have the land in fee simple. Here there was an inconvenience remedied by the Statute of Wills abovementioned 32 & 34 Hen. 8th by which every man had full power to devise the land itself.

When Lands became alienable by the Statute Quia emptores 18th Edw. 1st the descent was confined to the blood of the alienee or first purchaser.

1st The first incident there inseperable from an estate in fee simple is 1st That it is alienable. There cannot be granted a fee simple with restraint of alienation. to attempt it would be vain.

2d Another incident to such an Estate is that it was descendible to the heirs general of the purchaser. But supposing there is no lineal heir? It would descend to the next collateral heir of the whole blood. Here the collateral relations were let in. It would be well to remark that lands cannot lineally ascend. "Quia ponderosa res est terra". In vain may we look for instances of this in the English law. Lands then are alienable & descendable to the heirs general; by this, it must be understood that it descends to every child alike. This means according to the law of descent.

3d Another incident is that when a man dies seized of an Estate in fee simple, the Wife shall have dower.

Real Property.

4. If the wife dies seized of land brought to her into marriage, the husband shall have tenancy.

5. No waste can be committed by a man owning lands in fee simple. But how must the Estate be created? Formerly in England, words both of perpetuity & descent were required; but now an Estate "to a man and his heirs," will create such an Estate: for the word heirs is indispensable. But it is not said what heirs. This is regulated by the law of descent, & we may justly conclude that this word heirs, serves only to give the quantity or duration of the Estate, & not to specify the way in which it shall descend.—

From all the foregoing I have think that the last definition which can be given of a fee simple is "that it is an Estate to a man & his heirs". In Comm.t G. Reeve supposes "allodium" & fee-simple to be equal, & the same; & he thinks that lands do not escheat here unless pointed out by a Statute.—

With respect to the creation of an Estate in fee simple, by devise, it is very different from a grant. What will make an Estate in fee simple in a Will, will by no means make it in a deed. What is the reason of this? About the time of the making the Statute of Wills, mankind were less hamelled in technical terms. This being a transitory period, the Legislators thought themselves at liberty to say that in this new created Estate, any words used by the Devisor which made it apparent that a fee simple was intended to be created, would create such an Estate. In a deed it must be observed

in a Will the intention of the Devisor, is the pole star by which to be governed. In the same a strict & liberal construction is to be ~~observed~~ given to the latter, a liberal one.—

In a devise the words "all my Estate", "all my effects" & even all I am worth will convey an Estate in fee simple. But there is in England one curious exception, for where a man devises an Estate describing it "per se" to ~~him~~, it will be only an Estate for life. It will be otherwise in Conn.t, & yet the intention of the devisor is the pole star in both countries. Here you see the only difference between England & Conn.t in the construction of Wills for in every other case we have gone all lengths with the English.—

But recollect the intention of the devisor is never to be regarded when it is against law.— As where there is a devise to the brothers or sisters exclusively; this would be such an Estate as the law knows nothing of. To make an Entailment the word heirs is necessary. It would not be a fee simple because it would be restrained. It would not be a fee tail because "heirs of his body" are not used.—

I. The next Estate known to the English law, is a fee-tail; but as one it is treated & particularly a few observations will be made, on an Estate not now in existence, but out of which the abovementioned Estate grew. "It was the father & mother of Estates tail". It was a fee conditional at Common law. Among the nobles & as spirit of aristocracy & family pride was so predominant, that they could not bear the idea of fee their Estates go out of their families. Hence the

Fee Tail

introduced grants to their Children & the heirs of their bodies. This was not a fee simple because it restrained alienation. The Judges construed these estates not such as must necessarily descend in the family, but they construed them as fees conditional which depended on the condition or contingency of having Children, & when the condition did happen (i.e. the having Children) the Estate was gone, & a fee simple vested in the donee. This construction given by the Judges (who were at that time at enmity with the nobles &c) struck up by the roots this private scheme of the aristocrats. They did not abandon their plan here, but caused the Statute de donis Conditionalibus 13 Edw. 1st to be enacted which restrained the Estate to descend in the family of the grantee in infinitum. This Statute could not be evaded. It was a sore grievance and at length a remedy for it was found, which is called, coaking an entailment. This was by a friendly suit. John Stiles wishes to alienate or dispose of his lands in Tail to Tom Nokes. – John tells Tom to sue him for the land, & that he will make no defence. Tom accordingly commences a suit, John in court vouches the vicar who knows nothing of the matter. A nominal sum is recovered against the vicar. A judgment goes against the defendant, & gives the Ptff. a regular and complete title to the land. – This is a Common Recovery. – –

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An Estate tail general is an Estate to a man and the heirs of his body. But what heirs? This is regulated by the law of descent. Collateral relations are entirely excluded. This was restoring Estates descendable only to the blood of the first purchaser. An estate tail special, is where lands are given to a man and the male heirs, or female heirs of his body.

An Estate tail, female special is where the Lands are limited to the female heirs of his body begotten on a mans present wife. But how, if there are no such heirs, if the entailment is not docked by a recovery. Here the estate will revert to the donor. An Estate tail then may be said to be a less Estate carved out of a greater. — 1. It is incident to this Estate that the wife has dower. 2. And the husband Curtesy, as the case may be. 3 And that the tenant is not punishable for waste & therefore cannot be distrained upon, for it. & 4 Docking Estates tail. —

In Conn.t. there is a Statute creating entailments. It has not altered the English doctrine of Estates tail only in point of limitation, or duration. — It remains an Estate tail until the grantee has issue upon the happening of which an Estate in fee simple vests in them. — It is, I presume nearly allied to fees conditional at the Com. Law. —

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The Statute was made here to prevent a man's spending his property from his Children. It has been said that the Statute of Conn.t vested a fee simple in the Children as soon as they were born. The words of the Statute are, that "the Estate tail shall vest a fee simple in the children of the grantee." It has been said that the grantee by these words takes only an Estate for life, if not an Estate tail. — Kent flatly contradicts this; for if an Estate passes it certainly must be an Estate tail, or why the words Estates "in tail". The term made use of was quoted with a view to Estates tail in England. — For a proper construction we must then refer to English books. Were this not done we should be entirely out at sea in our legal proceedings. The fact is, the grantee takes an Estate "per formam doni" that is an Estate tail; if the donee has it not in his power to bark the Estate by a fine or recovery; for then the intention of the Legislature would not be answered. It has been determined that the wife shall have dower in this State, which is decisive of the question. —

As Kent's object is to make us familiar with the doctrine concerning Estates, he will unavoidably be led into repetition. —

Estate in tail & Estate in fee simple are the only Estates which can descend; tho' the former being regulated by the Statute, to descend per formam doni, does not descend as the latter. Still the Law of descents regulates both; & in both the eldest son takes first for the word "heirs" in a fee simple only refers to the quantity or duration of the Estate, & not to the manner in which it shall descend. —

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Estates of inheritance are freehold Estates; but yet there are some freehold Estates not of inheritance, as Estates for life of any kind, or estates which are esteemed Estates for life, depending on a contingency which may last for life — Hence we see that one may have the freehold & another the fee simple. I have spoken, & will for sometime continue to speak of Estates in Land which is a corporeal hereditament & includes every thing whether mines or water &c — Incorporeal hereditaments are neither visible nor tangible & some of them are as much real property and as regularly descend as any thing else among which are a right of fishery — a right of Office &c. tho the Judge questions whether a a right of office can be granted in this country. These incorporeal hereditaments savor of something corporate. They are real Estates. —

As to the operation of deeds. — The word land, houses, barns, orchards, waters, fuges, moors, heaths, ponds lakes &c &c are often used in deeds, but they are by no means necessary nor ever have been so. How comes it then that they are used? We have the use of them to not a very honorable source; namely, that clerks who wrote deeds were paid very handsomely in proportion to their length. Hence they introduced these unnecessary words. By the term "land" passes every thing; & the word "farm" when properly describe, will convey as much as land. —

A man may convey land and yet a fee simple

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as any other Estate, in the wood & houses &c. In fact he may exclude any thing on the Land, & retain it to himself or convey it to another. — If the house is excepted, it will be a lease of the Land wherever it stands, as long as it stands. 8 Co. 13.

Rent is one species of property of an incorporeal nature, which appears to be personal in every other respect, than that it descends to the heir & not to the Exr. I mean an Annuity, which is a claim upon the person of another. Co Lit. 2. —

" If a man gives an Estate to A & his male heirs forever, what Estate will pass? Why a fee-simple, altho' a limited Estate was clearly intended. If in this case A dies without male heirs, but with female, the latter will inherit, because the law knows of no such estate as was intended. The intention to convey thus is an illegal one, & consequently a vain intention. In the grant above words of inheritance & words of perpetuity make it a fee simple. —

Any words in a devise which will make clear the intention of the devisor will convey just such an Estate as was intended. No words of perpetuity or inheritance are necessary in devises. —

Suppose in a Deed an Estate is given to A & B. & his heirs? Now for want of knowing what heirs were meant this was construed to be an Estate for life. It would have been otherwise in a will. — If a grant is made to A & heirs, &c.,

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there will be only an Estate for life.

In Corporations the word successor answers the same purpose as the word heirs to individuals. Tho. a grant to Corporations aggregate will convey a fee simple without the word successors. -

Exceptions to the general rule that the word heirs is necessary to convey an Estate in fee simple. Men who hold their estates together as parceners; where one wishes to convey his estate to another, there needs no words of inheritance. So in case of Corporations. So of devises. (The reason that males could not be parceners in England is, that estates never descended equally to all the sons, but they did so to all the daughters.)

It was a maxim before devises were customary that a fee simple could not be limited upon a fee simple: for by the first grant all the Estate which the grantor had passed to the grantee. This Q Reeve thinks savors too much of technical reasoning. In case of Wills, however a new Estate arose which is called an executory devise, which shall be treated of hereafter, by which a devise of land might be made to A in fee simple, provided he pays to B £ 1000. but this cannot be done in grants. Cro. C. 590, 1. By an executory devise a fee simple may be limited after a fee simple. -

But however true it is that you cannot limit a fee simple upon a fee simple, yet there is an estate which can be created of

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and which answers almost the same purpose. It is a conditional fee simple. A base or qualified fee - as an Estate to A while he is owner of the Manor of Dale &c Co Lit. 27. -

As you can create an Estate in fee simple by devise different from what you can by a deed, so you may create an Estate tail in a devise by different words than are required in a deed, as by the word his heirs his issue &c. Reeve conceives it to be a lamentable circumstance that mankind have been and are now so trammeled by technics. -

A tenant in tail has power to sell the Estate so as not to affect the heirs. He may sell the Estate for his own life only, & it will be good against him. He cannot charge the Estate tail to pay debts after his death. It may go to the heirs clear of incumbrance. A tenant in tail may convey an Estate in fee simple, & it will be voidable as to the heirs. Estates tail are subject to be sold in case of Bankruptcy by a Statute of Jac. -

A man may create any special entailment. But it is a rule that where there is granted an Estate in tail male general, or special, they must take thro' males only, & if an Estate in tail female, they must inherit thro' females only. Co Lit. 20. -

Reeve was here asked that in case of a fee simple & the tenant thereof dies without any heirs, would become of the es-

tate in this country? He replied that in most of the States they had made statute regulations, & in Connt. in such case the Estate would be sold by the Admr. & the money put into the public treasury. But where there were no regulations made, he supposes the Estate would (as in a State of nature) be open to the first occupant, for land here is perfectly allodial.—

There is an Estate which seems to form a middle link, between an estate tail and an Estate for life. It is tenant in tail after possibility of issue extinct.— As where there is a special entailment to the heirs of the body of John Stiles on his present wife Mary to be begotten. Now if Mary Stile dies without issue. J.S. is tenant in tail after possibility of issue extinct. He is tenant in tail in every other respect than that he is disunishabl for waste. The reversioner cannot sue him for waste. 4 Co. 53.—

Estates for Life

Estates for life are sometimes conventional, or created by the contract of the parties themselves, others are merely legal & created by the operation of law. The former is where a lease is made to one for the term of his own life, or for the life of any other person, or for more lives than one.— Any Estate given to one which may or may not last for the term of his own life, depending on some contingency, is esteemed an Estate for life, &

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has all its properties. — But any lease for a determinate time if for one thousand years, will be only an Estate for years. which is merely a Chattel in England. But in Convt. long lease have become as freehold Estates.

In Wm Penns leases of lands in Pennsylvania were expressed thus "to hold the land as long as mountains stand brooks run, & trees grow." These are construed by them as Estates in fee simple. But this kind of estate is clearly neither a fee simple, fee tail, or any other kind of Estate known of in the English books.

The Estate for life created by operation of law, are tenant in tail after possibility of issue extinct. Tenant by the Curtesy, & tenant in Dower.

The incidents to conventional Estates, as well as one created by operation of Law are the same. 1. That in these Estates the tenant may take upon the land reasonable Estovers & bates 2. That the tenant shall not be prejudiced by any sudden determination of his Estate. 3 A third incidents relates to under tenants, for they have greater indulgencies than their lessors

Of Estates for life created by operation of Law.

And 1. Of Dower. — The intention of Dower is to provide a suitable maintenance for the wife, & in some particulars

it differs from any other Estate. By the English law the wife has 1/3 part of all the real property, of which the husband was seized in fee simple or in fee tail during the Coverture. For the wife to have taken dower it must have been such an Estate, as that if the husband had issue by the wife, it could have inherited. But to this there is one exception, that an Estate in special tail could have been so made, as to render it not inheritable in this way. As to this we can only say, "ita lex scripta est."

This right of the wife to dower created great embarrassments in prohibiting sales; for of any lands sold the wife had a right to claim her dower. To remedy this in England the husband suffered a fine of recovery which barred the wife of her dower, in which however, the wife must join.

This Estate has some particulars ~~incidents~~ privileges not incident to other Estates. as. 1. An exemption from paying the debts of the husband; for if a man dies insolvent, having in possession a large real Estate, the Creditors may in vain attempt to deprive the wife of one third which is her Dower. 2. Another privilege is, that a woman's dower cannot be devised away by will; neither can it be cut off from her by any act of law. The husband is empowered to sell all personal property & thereby he can bar the wife of dower.

A woman may be a lawful wife and yet cannot be

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endowed, as an alien wife. For altho' an alien may hold property if it is not taken from him (which it is always subject to be) yet it can never descend from him. Co Lit. 31.

A woman divorced a vinculo matrimonii cannot be endowed, & this proceeds upon the ground that she never was a lawful wife. If a wife is under nine years of age it is a rule that she cannot be endowed. This J Reeve thinks a very unusual rule. Co Lit 33.—

A wife may bar dower by an act of her own, which is an elopement with an adulterer, & the husband not reconciled to her. Elopement itself according to our idea of the word, will not be a bar. Co Lit 32. 1 Pull. 680.—
C. R. supposes that elopement itself meant formerly elopement with an adulterer.

Where our Statutes have not varied their we have almost uniformly adopted the English rules of Estates in fee simple, fee tail, Dower &c.

A seizin in law of the husband is the same for securing the wife's dower, as where he is seized in fact, for if he is not seized in fact the wife cannot help it.—

In case of Joint-tenancy the wife cannot be endowed, because of the Jus accresendi or right of survivorship to one Joint-tenant in case of the death of the other.
Estates in Joint-tenancy cannot be devised because the

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title is ambulatory: or as Finch expresses it, the agility of the title or right of survivorship is so great, that it survives before the devisee can have a title.

A wife is also entitled to dower in an incorporeal Estate as a right of common: a fishery &c but this is real property. She cannot be endowed of an Office, for she has not the capacity to perform the duties of it.

A wife may be barred of her Dower by a Jointure, which is a provision made by the husband for the wife in lieu of Dower.—

1. This must, to be good, be done before marriage; for then the woman is sui juris, capable of judging of the competency of the Jointure, & is not under the coercion of the husband, for if it was not then made before marriage, she might be barred of her Jointure by an insufficient Jointure.

2. It must be a competent livelihood; by which is meant a livelihood proportioned to the husbands Estate.

3. It must be taken immediate possession of, on the death of the husband.

4. It must be of real Estate; because real Estate is more permanent, & cannot be easily spent.—

5. This conveyance must be made to her & not to trustees for her. 1 Atk. 561.—

If all these requisites are complied with it will be a complete

bar to Dower. — A Jointure at common law was no jointure bar; but was made so by Statute 27 Hen. 8th.

To make a marriage settlement it need not be of real property, & therefore marriage settlements cannot bar dower. —

But Jointures are frequently made after marriage. These if accepted by the wife will bar her dower at common law. So a Jointure by devise but it is altogether at the election to accept or not, for she is under no obligation; but may take her dower at common law, but she cannot have both. —

It is holden in the English Reporters that if the husband devise legacies to the wife (which consist only in personal property) however large & important, & not expressed to be in lieu of Dower, that they shall not be considered as Dower, but that she may take both legacies & dower. 4 Co. 4.

In Conn. & York & Massachusetts people have got an idea, that they must express in their will these words. "I devise 1/3 of my property to my Wife May to hold during her life." not recollecting that (or rather not knowing) the wife will have her dower at all events. This then is not expected to be as dower, or in lieu of dower, but I believe thinks it would be improper and unjust to give her 1/3 more as dower, when the testator intended what he devised in his will as dower. This is certainly a question but our Courts of probate presume, that it was intended in lieu of dower,

and never allow her to take both. I believe suppose that when the matter is brought before the Superior Court by some more Lawyer like woman it will be decided that she shall take but one. — No decision has however as yet been had in the Superior Court ~~any~~ on this question. —

Dower is lost by attainder of Treason; a Jointure is not however, because it is vested before marriage. It cannot afterwards be appented by any act of the husband. —

As to the Wife's remedy for her Dower. — She may remain 40 days after her husbands death in his house during which time (which ~~time~~ is called quarantine) It is the heirs duty to set out her dower. If he does not do it from a want of will, or if he is too young to do it, or if he flies out if she is not pleased with it, she may make application to the Court of have her writ of Dower. In all cases when the heir is a minor, she must sue out her writ of Dower. —

But in case the Jointure proves not to have been the husbands property, if she is evicted only of a part of it, she may relinquish it & take her dower at Law. Moors Rep. 717. 720.

Wherein the Doctrine of dower in Connecticut differs from that in England. — — — — — —

In Connect. the Widow can be endowed only of one third part of what her husband actually died seized of. A man then wishing to defraud & cheat his wife of her dower may con-

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vey away his property before his death. But to remedy this as much as possible, it has been determined, that of property conveyed away in contemplation of death, the wife shall have her dower. — As where an aged man made deeds to his children; but dare not deliver them to them, to this fearing they might deprive him of the benefit during his life, but left the deeds with the Vestry-man of the Parish (Dr) ordering him that the moment he heard of his death, to run to the register's Office & get them recorded, which he accordingly did. In this case the Court of probate for Litchfield district determined that the title was not complete in the grantees, till after their fathers death, & therefore she was not barred of her Dower in such Lands. Again. the Court of probate & Superior Court in another case decided that the wife was not barred of dower where the deeds were actually recorded before his death. —— But these conveyances have not been considered as deeds; but as wills because made in contemplation of death; for an instrument of writing thus made is not the less a Will because it does not begin in common form. — That this is not a new idea introduced by our Courts see 2 Ver. 431. 440.

In Conn.t a woman is entitled to Dower even in case of divorce a vinculo matrimonii if she is not the party in fault. It must be recollected that divorces in Conn.t are for disjunctive causes. —

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In Connt. a woman may be endowed of a Jointenancy because the doctrine of survivorship does not obtain here.—

In Connt. the widow cannot forfeit her dower by the treason of her husband.—

It has been a question in Connt. whether a woman can have a Jointure in any Estate which is not real.— Such a thing certainly would not do, for if personal Estate was allowed the husband might dispose of it immediately on the marriage taking place. On a thorough examination of Reeve supposes that the words "other Estate" in our stat. means other estate which may be the subject of Jointure at Com. Law.—

So much may suffice to be said concerning Dower, & Reeve will now proceed to the consideration of

Estates held by the Curtesy of England

Tenant by the Curtesy is where a man marrying a woman seized of lands of inheritance, & hasly her a child or children born alive, which issue could have inherited. Now upon her death the husband shall hold the lands during his life as tenant by the curtesy of England.—

The regulations concerning tenants by the curtesy are positive regulations, for which there is no apparent reason.

The difference between dower & Curtesy.—

1. In dower the wife is entitled to 1/3 of all the husbands

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property. In Curtesy, the husband has all the property of which the wife was seized.—

2 In order to take Dower, there is no necessity for issue: In curtesy here must be issue born alive.

3 The wife may have dower in lands of which the husband was seized in law. To entitle the husband to curtesy the wife must have been seized in fact.—

Wherein they agree.—They agree in these.

1. That each is a provision made, by the one, for the wife the other for the husband.

2. In both there must be death: In Dower, of the husband. In Curtesy, of the wife.

3. In both the Estate must have been such an one, as that the issue would have inherited. But cannot the issue always inherit, in case the Estate is one of inheritance? It has been already observed, that an estate in tail special may be so made as to prevent the inheritance of issue; In such Estate therefore the wife can neither have dower, nor the husband Curtesy. Co Lit 29.

There has been a division entertained in Con.t of one division that the English doctrine of curtesy could not be adopted altogether here, because we had no Statute adopting it. This one division was about 40 years ago. In which case the children claimed the Estate of their mother against their father. They contended the law carried out a Curtesy no longer than their minority, & the court so decided

But where the heirs were collateral, as brothers & the husband then unless during life. A few years ago the question came up again, & it was decided contrary to the other decision & that we had adopted the English law of Curtesy. Concerning Dower we have a Statute made in abrogance of the English doctrine with some small variations.—

There are a great many various customs grown up in England, among which the two principal ones are gavelkind & Borough English, both of which cover a great deal of English ground. Gavel kind prevails in the County of Kent & is where all the sons inherit together; & here the husband is entitled to Curtesy whether he has issue or not. As the Charter of Count. grants our lands to be held according to the tenure of Co. Greenwich in the County of Kent (where Gavelkind prevails) the tenure of Co. Greenwich therefore is said to be ours where we have not altered it by Statute. In this respect we may agree with Co. Greenwich, but in every other respect we have adopted the Common Law Curtesy.—

It has been a great question whether a husband could have a Curtesy in a trust Estate of his wife & there are many trust Estates. In Equity, or redemption is one of the husband can have curtesy in it. The wife can-

5 Ba. & Ad. 229
1 Atk. 663

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not in England he endowed of a trust Estate as has been determined. Altho' the Lord Chancellor Talbot declared that this determination in case of dower was a hasty one, yet he would not rip it up; but decide that the husband could be tenant by the courtesy of such Estate. The Superior Court of Conn.t decided in Fairfield County about A.D. 1807. that the wife could be endowed of a trust Estate.—

3 P.W. 269. do. 235.

A question has been made whether the husband's eloping from the wife, bars him of courtesy—of decided that it does not.—

3 P.W. 275. 2 Ch.

Another question of some magnitude in England of occurring so in Conn.t, is wether the husband can be tenant by the courtesy of an Estate given to her of her heirs for her sole & separate use; The Courts of G. Britain that it is plain by the grant of the donor that the husband was not to have any thing in such Estate, but the wife of her heirs separately & solely. And it is completely within her power at any time to sell it or do as she pleases with it.—

3 Atk. 695. 1 Ves. 298.

Another estate for life which grows out of the wifes estate, & not granted to her sole & separate use is the estate which the husband has in such property during coverture.— There case in this a joint-

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estate, but the husband has exclusively the usufruct, which is any thing produced on the land by his labor & which does not appertain to the freehold, or inheritance. It is in fact the crop. The annual produce. He being entitled to the usufruct he may have an action in his own name for any injury done to it, tho' the wife is very often joined. But if an injury is done to the inheritance or freehold, which is the grass, land, or trees, she must join her husband in an action, because the injury in this case is done to her.—

The foregoing Estates are all created by operation of law.—

Of Conventional Estates.—

Conventional Estates created by the act of the parties, are such as are given to a man by some instrument expressly for life.— They are sometimes for the life of another person, & sometimes for more lives than one.—

It should be recollected that the incidents inseperable from a fee simple are 1 Alienation. 2 Being descendible to the heirs general. 3 Dower of the wife 4. Curtesy of the husband. 5. Being disseisonable for waste.—

To a fee-tail: 1. Being disseisonable for waste. 2 Dower of the wife. 3 Curtesy of the husband

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1 That they can be docked. — To an Estate for life. 1. that the tenant may take upon the land reasonable estovers or botes. — 2 That he shall not be prejudiced by any sudden determination of his Estate. 3 A third incident relates to undertenants or lessees, for they have greater indulgences than their lessors. —

No tenant for life has a right to commit waste, except there is an express right granted in the lease to commit waste. —

The Statute of Comm.t (which has been laughed at a great deal) declares that the tenant in Dower must leave the estate in good repair &c. as if any satisfaction could be had of the wife when dead, if she did not thus leave it; but the object of the Statute appears to be clearly to subject her to damages, unless she keeps it in good repair during life. —

These tenants have all a right to take off from the land what is necessary for fuel, or for carrying on the business of the farm; which is in old saxon language sufficient Plough Bote — Hay bote — & Fire bote.

It has been observed that any Estate resting on a contingency which may last for life, will be esteemed an Estate for life, & have its qualities: but no Estate for a determinate period can be a life estate, nor possess its qualities.

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It is a maxim of the English law that no Estate of freehold can be made to commence in future, — This is broken in upon by no other conveyance than that of Wills. But why cannot this be done? — All conveyances were formerly by livery of seizin, because they did not then know how to write.

A sale could not then be perpetuate except by matter of notoriety. Since writing has become customary the delivery of a deed would as completely convey a title as twig of turf. — Altho the reason of this rule has ceased, yet the rule itself remains, that an Estate of freehold, if it passes at all must be in existence when the deed is delivered. — But in a statute in Conn. it is declared that no Estate in fee-simple, fee-tail, for life, or any less estate, can be passed by deed or will unless given to a person in being, or to the immediate decendants of a person in being. — Of course an Estate can be made to commence in future, for it can be given to the child of one when born. —

In executing devises the longest term in which it can be given, is for life or lives in being, or 21 years & 9 or 10 months afterwards.

In Eng. an Estate granted to A for life, remainder to B. here the Estate does not commence in future, but it passes out of the grantor both to A. & B at the time of the grant to A.

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to shew the truth of this, if there is any waste committed during the life of A. B the remainderman or reversioner must sue, as the case may be.—

This doctrine applies to incorporeal hereditaments in which a real estate may be had

6 Lit 42.
1 Roll. 844.
4 Mod. 193.

The operation of the Statute of Frauds & perjuries authorizes a sale without livery of seizin.—

"Estates" in autre vie" or for the life of another stand on the same footing with in case of the death of the tenant pur autre vie: in this case who could take the estate? for the man could not take it bc the grant had not yet expired.— It could not escheat because it is a rule that part of an estate could not escheat.— The heir could not take it because there were no words of descent.— Neither could the Exr. take it for it was real estate.— It was then hereditas jacens open as in a state of nature to the first occupant, until by Statute it was treated as personal property & made assets in the hands of the exr. It was also devisable by will.—

There is one principle in eq. in cases of Estates for life, which we have not adopted, which is, "that the alienation by a tenant of a greater estate than he has, is a forfeiture of his estate." But here the feudal idea does not govern & such a sale will convey all the estate the tenant had.— Therefore it was no forfeiture. In eq. if the reversioner joined with the tenant it would be

considered as a renunciation of a complete conveyance of all their estate. —

Matters of great litigation of which I can in these lectures give but a very imperfect sketch will follow. It is a rule in one type case (1 Co. 104) that "where there is no difference of division, that if an Estate is given to a man for life," & in the same instrument the estate "to his heirs" here notwithstanding the grantor, it will be a fee in the grantee or devisee. — If it is given or devised to the heirs of his body, it will be an Estate-tail. The words ~~as~~ for his life are construed as nothing, & this according to the Feudal idea. The word heirs in this case, will be a word of limitation i.e. it will mean the heirs general) & not a word of purchase as descriptio personae, a word of description. — In all this there is no disagreement. The Judge, recollect, has spoken of agreements executed & not executory

Let us proceed one step further, & we will find the "nutty point" which has exercised the skill & called forth the ingenuity of the greatest legal characters in Europe. The construction given to a will or deed consisted in the words preceding being manifestly contrary to the intention of the grantor or devisor, it has been contended that altho technics when alone in a grant must be construed in a legal way, yet if there are any other words besides merely the words to A.

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for life & to the heirs of his body, indicative of an evident meaning that it should vest only an Estate for life in the grantee & that it should be considered as vesting only an Estate for life in him.— That the word heirs should be considered as a word of description, or purchase & not as a word of limitation. This is evidently in favor of the intention of the testator or grantor.— But on the contrary it is said that there cannot be a construction different from the known principles of law; & that it is an acknowledge principle that whenever the word heirs, is used it must irresistably vest a fee simple if any thing, because heirs is the word by which a fee simple must be made. That this operative and legal word must & will control the intention of the party conveying the Estate

Judge Reeve is of opinion with those who are for laying hold of all the words, & construing them according to the intention of the testator. We all know that where there are no technics used, the construction must according to the intention of the devisor or grantor, & that any estate could be given if not contrary to the principles of law. Could the grantor then give an Estate for life? He could. We can continue an evident intention to do what was legal — because the word heirs happened to be used? Judge Reeve does conceive that all depends upon the nature of the estate given, and not upon the words made use of.—

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The case of Bagshaw & Spencer (4 Burr 2579) was of this nature; an Estate was given to Jno. Bagshaw for life, & for the purpose of preventing a forfeiture, it was then given to trustees to preserve for his heirs. Here there were other words used to shew the intention of the grantor, & according to such intention it was determined that Bagshaw had only an Estate for life. — Here the heir took as described in the instrument. This Judge Reeve conceives to be a very important case. There is also much important doctrine disclosed in the case of Perrin & Blake, & very many cases in point cited. — Mansfield, Hardwicke, & Buller were for observing the intention of the Devisor. Is the intention to be thrown out of the question & certain technics to be observed? No. The intention whenever it is a legal one, ought certainly to be observed. — A man may so express his intention as to control technics. Bullers argument is excellent in one of the cases cited) & coincides with Judge Reeves. — The case of Bagshaw & Spencer or Leonson & — the latest & most satisfactory. The doctrine however from this case is not settled. Powel, Foune, & Gates are for observing technics; & opposed to Hardwicke & Buller & Mansfield.

The question came up exactly in Connt. & was learnedly argued by D Daggett & Minott Sherman on one side; & D. Edwards & J B Sherwood on the other. —

Real Property.—

The reasons of the Judges were in favor of the intention but the point was not settled.—

Emblements.

There is a species of amphibious property, sometimes real & sometimes personal, called emblements which may be defined to be any thing, which is the annual product of labor.— such things as are raised by the industry of the tenant. In short the emblements are the crops made on the land held. These emblements adhere to the freehold as well as trees, or grass, but yet they are not always real property.—

They will pass by a grant of the freehold, therefore, they are in that point of view, considered as real property.— Theft cannot be committed on them (except severed from the freehold) in that point of view they are also considered as real property.— But in case of the death of the tenant they will not descend to the heir, but go to the Executor, & in this point of view they are considered as personal property.—

It is a general rule that the emblements will not pass by a devise. Therefore a devise is made of the freehold sometime before the death of the tenant say 8 or 10 years; the emblements clearly will not pass because they were not had in view at the time of making the devise.— But suppose the devise of the freehold is made to day, to pass instanter, the ques-

Gilb. L.E. 499 Paxe. ante 500.

tion is will the emblements pass? This is unsettled.—

When a tenant in fee simple dies, or when a tenant in fee tail dies, the emblements will go to the heir. — But what will become of them in case the tenant for life dies. They will go to the Executor as assets in his hands. — Otherwise if the tenant for life determines his Estate by his own act. —

Gilb. L.E. 499. 2 Lev.

Where a man dies, whether he be tenant for life, tenant at will, or tenant ~~by~~ ~~sufferance~~ for years, having no knowledge of the time at which his estate will determine; he shall in case of a determination have the emblements & free ingress, egress & regress to get them off the Estate. If he dies the emblements will go to the Executor as personal property. But remark that it will be invariably the case, that when the tenant puts a period to the Estate by his own act, he will have no right to the emblements & of course they cannot go to his Executor. — So much for emblements. — J. Reeve having finished his remarks on freehold Estates, he will now consider Estates ~~at~~ less than a freehold, which are.

Leases for Years. — Estates at Will, & by sufferance

I. "An Estate or lease for years is a contract for the possession or lands & tenement for some determinate period."

This Estate altho' near in lands, is not real, nor real, but a Chattel interest. — It goes to the Exr. upon the death of the ten.

Real Property.

-ant, as other Chattels if is applied to the same use, altho it may be ten times as durable as a life Estate, which is a freehold. — If any Estate is leased only for one month it is an Estate for years, as much as if for ~~one~~ 1000 years. —

Every Estate which may continue for life, as an Estate during coverture, during widowhood, or until, married, are estates for life. — But what distinguishes leases for years from these estates, is that the former begins & ends at a determinate period. — Under principles of common law, an estate of freehold cannot commence in future, — Estates for years may be made to commence at any time. — In making a lease for years, if no time is mentioned, it will commence on the delivery of the lease. —

The words generally used to create this estate are, "demise, lease & to farm let." But these terms are by no means necessary. — Any words which will shew a certain intention of the lessor, will convey just such an estate for years as is expressed, or was intended. —

At Com. law, it is said that leases, or years might be made by parol, but by the Statute of Frauds, & since there can be no ~~estate~~ interest created by a parol agreement; reserving the exceptions there made. — But by the construction given to this Statute by some, a lease by parol would be good. — But Reeve thinks that even before the Statute

of frauds & perjuries, leases to have been good which have been in writing, & he thinks the true construction of the Statute is this, that all leases whether for a longer or shorter time should have been in writing: but that if a lease is made for less than a year, it is unnecessary to record it.—

If however a man does make a lease by parol, & in consequence thereof a tenant enters, it will not be void as to all purposes, for it will be a licence to save him from an action of trespass, for his entry will be lawful.—

Again: if a parol lease is made with reservation of rent, & entry in consequence thereof, the rent shall be paid but not on the ground of the lease being a good one, & the tenant thereof acquiring an interest in the land; but simply on the ground of the tenants receiving profits or advantage for which he ought to pay.—

Who can make leases? I mean in fee simple can make a lease for any time he pleases because the whole profits resides in him.

But tenant in tail can make no lease that will be binding on his heirs, except by the Statute 32 or 34 Hen 8th. which enables the tenant in tail to lease for lives or 21 years which might last more than his life & so long as it did last the heirs would be bound thereby.— Can tenant for quality

Real Property.—

vie make a lease? J Reeve supposes upon principle that he may, but he knows of no case determining the point.—

Lessee for years is liable for waste either active or permissive; if it is such as the law deems to be waste. But the lessee cannot be sued in trespass, because he came in lawfully into possession.

"As to the manner in which long leases in Conn.t are acted upon, many rules cannot be laid down."— But J Reeve says the Judges have for 50 years (as lease for 999 years) considered such leases as freehold or real Estate.— If such a case the wife has been endowed & the husband entitled to curtesy.— A man being lessee under one of those long leases had been deemed a freeholder; none of which things could have been done unless the property had been considered as real.—

A lessee for years may under let or assign his whole term.—

II. What is called an Estate at Will. Judge Reeve considers as no Estate at all, yet something must be said about it. It is not real property, because it cannot descend.— It is not an Estate for life because the tenant may be turned off instantly.— It is not an Estate for years because it is not for any determinate period, it depends upon the will & caprice

6 Lit. 55

of either party. It is in fact only a licence from the [illegible] permitting a man to enter, & then it is held at the will of each party.— What right then does he acquire by an entry? He acquires the right if it can be called one, of not being a trespasser. 2 What is the product of his labor he is entitled to.— He is in fact entitled to the emoluments, & if the owne wishes to determine the Estate before the emblements are reaped, he may do so, but he must allow the tenant free ing egrs, egrs, & regress to cut & carry away the profits.— But if after the determination by the lessor, the tenant enters for the purpose of tilling the land &c he will be a trespasser.— The lessor shall never so far take advantage of his own wrong as to send off the tenant & keep the emblements to himself, for it was his own act to suffer the tenant to enter.—

Moor 775.

2 Bl. 146.

A tenant at will may be determined. 1. By notice of the lessor. 2. Any act of the lessor inconsistent with the company of the tenant at will.— It has been before remarked what will be the consequences of the determination of this Estate.—

This tenant at will is not liable for waste, but if he does any injury to the Estate which would have been considered waste in another tenant, it will be a tresp's in him.— His licence is personal, & he must therefore on no means assign it.— If he underleases it will be a determination of his Estate.—

Co Ed. 784.

Co Lit. 57.

Real Property.—

III. Tenant by Sufferance; is where one leases an Estate for years, & after the lease has expired the lessee continues on the premises the lessor knowing it.— J. Reeve says that this Estate is allied in every particular to a tenancy at will, & therefore nothing more will be said on it.—

The doctrine of mortgages of Estates upon condition generally, should have here followed, but Judge Reeve on account of being obliged to commence the circuit very soon will take up the subject of the

Distribution of Estates under the Statute 22d & 23d Car 2d. explained by the 29th Car. 2d.—

These Statutes altho they apply in England wholly to the distribution of personal property, are foundations for Statutes distributing real & personal estates in most of the U. States.— For the first place it may be necessary to premise, that a title to things real, is acquired in one of two ways.—

1st By Descent or 2d By purchase.— By descent as when a man comes to an Estate upon the death of his ancestor, without any act of the parties.— This is by single operation of law.— By purchase as where a title is created in a man by his own act or agreement. In fact according to the English idea purchase includes every mode of coming by an Estate, except by descent.—

The Canonical mode of distribution altho held to be involved in difficulty, yet by a proper attention it is believed that we may

acquire a more precise ideas of it than almost any other legal subject. A person understanding the common mode of descent will not be at a loss in any other state in the union. —

The distribution of property under the Statute of Dis. in England will be a complete stepping stone to the doctrine in Conn.t. After a knowledge of Conn.t descents is acquired, it will be no difficult matter to understand the English course of descents which will be intentionally omitted until the last. —

There are in the Statute of Dis. 3 principal clauses. —

1. When a man dies intestate, his property is given to his children & to their legal representatives, & for want of them. —

2. to the next of kin of their legal representatives, & no representation is to be admitted among collaterals, beyon brothers & sisters children.

1. As to the first point, there will be no difficulty, in if a man dies intestate, leaving a widow & children 1/3 of his, goes to the widow & the remaining 2/3 to his children in equal portions, or if dead to their representatives i.e. to their lineal descendants; if there are no children or their legal representatives, then a moiety shall go to the widow & a moiety to the next of kindred in equal degree & their legal representatives. If no widow the whole goes to the children.

2. As to the second clause. In case there are none of these i.e. if there are neither widows nor children the whole shall be dis

Death & Bequests.

tributed among the next of kin in equal degree & their legal representatives. But no representation is admitted among collaterals farther than the children of the intestates brothers & sisters. — The rules of kin are to be instituted on the same rules of consanguinity, as those who are entitled to administration, according to the civil law computation. — To find the next of kin in the ascending or descending line is an easy matter for it can be done by counting directly upwards or downwards, but when the next of kin are collaterals, how are we to find them? The rule is always to begin with the dead person, & count up to the common ancestor & then down to the collateral kinsman whose degree you wish to find. —

2 Rau 571.
2 Bl. 519.
2 Rey. 496.
2 Ver. 214.
2 Bl. 519 520.
Ch. Ch. 593.

By this Statute the Mother as well as the other succeeds to all the personal effects of their children who died intestate & without wife or issue, in exclusion of the sons and daughters, the brothers and sisters of the deceased. But to the law still remains with respect to the father; but by the Statute 5 Jac. 2. c. 17 (by which Statute the mother is degraded one degree) if the father be dead & any of the children are intestate without wife or issue, in the lifetime of the mother, she & each of the remaining children or their representatives shall divide his effects in equal portions. 2 Bl. 520.

2 Bl. 344.
Ath. 75, 8.
Hanley
Hanley

If the intestate had a Mother living, & no brothers & sisters or children only, they shall take per stirpes with the mother who shall have in such case the same share as a brother or sister would have taken.

And tho the Statute of 5 Geo. 2 provides only for the case where a son dies after the death of his father, without wife or issue, yet it has
2 P.W. 344. been determined, that where after the death of his father, the son dies leaving a wife, but no issue, leaving also a mother, brothers & sisters & children of a deceased brother, that this was within the Statute — That the intestates wife should have an moie
1 P.W. 25, 8. 594. & that the mother should come in for an equal share with the brothers, sisters & children, the representatives of the deceased brother. —

3. Representation does not extend among collaterals further
1 do. 25, 8. 3. 41. 48 than the children of the intestates brothers & sisters; tho
594. 50. in lineal descents representation may go on forever. —

It is a settled rule that when a part of the brothers or sisters are dead, leaving children, the children take per stirpes.
2 Ver. 213 215. i.e. by representation, but when all the old stock that is
1 Eq. ca. ab. 249. Cu. Ch. 54 the brothers and sisters are dead, the nephews & nieces being
2 8. 293 593 all in equal degree they shall take per capita, share & share alike.

Qu. Whether that the last part of the rule holds to
1 Atk. 445. all who claim as being related in equal degree; as where the
2 Atk. 116. the next of kin are uncles or aunts, or nephews & nieces: no
2 Bl. 509 510 representation is here allowed but they all take per capita.

Under the Statute of Car. now under consideration no preference is given to the whole blood over the half.

Real Property.—

2 Atk 115, 18 — A child in ventre sa mere will take in the same manner as
2 P.W. 446.
3 Atk 762. one born in the father's life time.—

It is a rule that the brothers & sisters shall exclude the
2 Vez. 213 214. grandfather ~~which~~ who is in the same degree with them both being in the second degree.—

If all the brother & sisters are dead leaving children, the grand father who is in the 2 degree takes the whole estate, in preference to the nephews & nieces who are in the 3 degree.—

From the construction given in the foregoing rules the Judges have never differed only in case of a bankrupt for which J. Reeve never could account.—

Aunts & nephews being in equal degree viz. 3. they
1 Atk 454. are equally entitled to take per capita

That the civil law computation is adopted
2 Vez. 213 under the statute of Car & also to prove the point next
Pre Ch. 54. above vide an. in the margin.— But where there is
Salk. 251. a brother the uncle & nephew will be excluded.—

No matter what the branches are if they are in
1 Vez. 333. equal degree they will take per capita, if any of the old
3 P.W. 50. stock are living the greatest difficulty is, in understanding correctly the ~~word~~ representation. In the claimant to take by representation there must be some of the old stock living, i.e. some are nearer than the claimant

himself, for if there is not the distribution will be per capita

Representation can never go further among collaterals
1 P. W. 595. than brothers & sisters children i.e representation shall
not go further among collaterals than the 3 degree. —

It has been determined in England that where there
are a grandfather & brother both living in the same degree
the brother shall take the whole. But there is no reason
3 Atk. 762. for preferring him, & Ld. R. thinks that in a bounty where
there are no determinations those in England would not be
binding under the same statute. —

For the distribution of Estates under the
Statute of Car. see the conclusion of Title of
Executors & Administrators

Distribution of Real Estates under the Statute of Connecticut. —

Previous to the making the Statute of Connt. the Stat.
of Car. was the rule in with real & personal property.
The great object of the Connt. Statute, was to secure the
property in the family of the ancestor from whom it descended
that it should be inherited only by his relations. Under
the Connt. Statute the widow has an absolute estate
in 1/3 of the personal Estate forever & a life estate
in one third of the real property. —

Real Property.—

In the Statute of Descent there are two important clauses. Real property which the intestate acquired by descent devise or deed, from any ancestor does not descend in the same manner as that which he acquired by purchase himself from one not a relation.— The former descended from the ancestor Mr. Reeve calls Ancestral Estate.— The latter one by purchase.—

1. The inherited or ancestral estate. The intestate has no issue (for if he has issue the Stat. of Dec. will furnish the rule) goes to the brothers and sisters of the whole as well as half blood, provided the half blood be of the blood of the ancestor from whom the estate came; or failing these, it will go to the next of kin, provided they are of the blood of the ancestor from whom the Estate came. They must be brothers of sisters of the intestate of of the blood of the ancestor from whom the Estate came, therefore no half brothers not of this blood can take.—

What is meant by "the blood of the ancestor"? Common law has arisen concerning it.— The old feudal idea was, that no person was said to be of the blood of the ancestor, except he was lineally descended from him.— But this is not the idea adopted in Conn.; for the brothers & sisters can take; neither was it the meaning of the Statute of Conn., as since the estate was to go "proximo consanguineo" to the next of kin. It is

in fact means no more than a brother or sister of him to the ancestor if not a lineal descendant.

2. Clause respects Estate which the intestate acquires by purchase from some one no way related to him. This estate goes as follows: If a man dies intestate it goes to his brothers & sisters of the whole blood & their legal representatives; if no such, to the father & mother as being of the next of kin; if they be dead then to the brothers & sisters of the half blood; & their legal representatives, and on failure of these to the next of kin. —

It ought always to be recollected that in the distribution of ~~personal~~ purchased Estate, brothers & sisters of the whole blood are always preferred to brothers & sisters ~~of~~ & other kindred of the half blood of the same degree. If the half blood are of a nearer degree of kindred than the whole blood they will be preferred. — Under the Conn.t Statute as well as under that of Ca. brothers & sisters of the whole & half blood ~~are preferred~~ & their legal representatives are preferred to grand parents, altho' in the same degree of kindred to the intestate. This rule as well prevails in Ancestral Estates & personal property as in purchased Estates. — Representation among Collaterals does not extend further than brothers & sisters Children. —

Distribution under the Connecticut Statute.

1. Case. The distribution of Jack Roe.

Real Property.

John Stiles dies intestate seized of Black Acre & White Acre. The former came to him by descent, devise or deed of gift from his father Reuben. The latter he acquired by purchase. His relations living were his mother Mary, his half brother Sam a son of his father by a wife not the mother of the intestate, & Tom & Sally brother & sister of the whole blood & John & Susan Rowe of the half blood, children of his mother by a husband not the father of the Intestate, his grandfather Solomon Stiles, & his uncles George & Edmond Stiles.

Ans. In this case his farm called Black Acre will go equally to his half brother Sam & to Tom & Sally of the whole blood, to the exclusion of John & Susan Rowe & his mother Mary. This distribution is founded on the following rules. 1. It goes to the brothers & sisters of the whole & half blood equally, for the Statute allows no distinction in Estates descending from an Ancestor to whom both the whole and half blood are equally related. – It goes to the exclusion of John & Susan Rowe, for the Statute requires that to succeed to such an Estate, that they shall be of the next of kin to the intestate, who is of the blood of the ancestor from whom it descended. –

2 Case as the last only Sam is dead leaving a child A. –

Real Property. –

tens. In this case the Estate will be divided equally between Tom & Sally & the Child of Sam for the Statute decides it shall go to the next of kin & their representatives

3d Case. Sam is also dead leaving B & C. they take by representation for reasons assigned in the last case.

4th Case. Sally is dead leaving D E & F. – Here they cannot take by representation, for the original stock are all dead. – But Solomon is now living & will take the Estate in exclusion of – A. B. C. D. E & F. because he is next of kin & of the blood of the ancestor from whom the Estate came. –

5th case as the last but Solomon is dead. Here the estate will be divided between the nieces George & Edmund, & the children of Sam Tom & Sally, because they are in equal degree of the next of kin. –

6th Case as the last but George is dead leaving G. – Here the Estate will go equally between Edmond & the nephews & John Stites, to the exclusion of G, as our Statute does not allow of representation among collaterals, beyond brothers & sisters children. –

7th Case Edmond is also dead leaving H & I. Here the Estate will go equally between Tom's, Sam's & Sally's children, to the exclusion of the children of George & Edmond.

Real Property.—

The distribution of White Line.—

1. Case John Stiles died seized of White Line which was acquired by purchase. His relations living were as in the first case in ~~Black~~ Blue line.

In this case the farm called White Line was equally divided between Tom & Sally of the whole blood because the Statute prefers brothers & sisters of the whole blood to those of the half blood.—

2 Case. Line came as in the last but the last blood is dead leaving a child A. here White Line goes as in the last case for the same reasons.—

3 Case. Tom is dead leaving children B & C. In this case the estate will be divided between Sally, B & C who are the representatives of Tom, for mothers & sisters of the whole blood & their legal representatives are preferred to those of the half blood.—

4 Case as the last only Sally is dead leaving D, E & F. In this case the Mother Mary will take as being the next of kin; as representation is now at an end there being no more of the original stock living.—

5 Case as the last, but Mary is dead. Here the grandfather Solomon holds the estate as the next of kin. Estate will go to Sam Stiles of the half blood and to John & Susan Crane under the new Statute of 1803 which says that for want of Parent

or parents the Estate shall go to brothers & sisters of the half blood. But in this case, if John & Susan Sam were dead the estate would go to the grandfather Solomon as next of kin.

6 Case Solomon is also dead.

In this case the estate goes to George & Edmond & to the Children of Tom & Sally as next of kin all being in the third degree.

7 Case. George is dead leaving G. ~~leaving~~ Here the Estate will go to the Children of Tom & Sally & to Edmond the Uncle and G. will be excluded representation being at an end. —

8 Case Edmond is also dead leaving H. Here the Estate will go as in the last case.

9 Case as the 5.th say Mary is dead. Here the Estate will go to John & Susan Rowe of the half blood. & to A the Child of Sam who takes as Sam's representative

10 Case. As the last only John Rowe is dead leaving I & J. Here the Estate will go to Susan Rowe & to A the Child of Sam by representation, & to I & J representatives of John Rowe

10.th Case as the last only Susan Rowe is dead leaving K & L. Here the Estate is divided between B, C, D, E & F. —

In a statute of Court. differs from the Statute of Car. in this: that the Statute of Car gives the property to the next of kin in default of legal representatives in the lineal descending line

Real Property

By the Statute of Count. it goes to the brothers & sisters & it is plain that sometimes they may not be of the next of kin, for a father or mother would be nearer of kin. —

It has been said that Post humous Children have been are as much entitled to a distributive share, as any children born at or before the death of the intestate. & it is settled that a posthumous child may have a bill in Chancery for an injunction to stay waste committed on the property.

2 Vk. 115
Salk 259 ca
2 Ver 323.

Our new Statute has made some very important alterations. It regards merely ancestral estate. Instead of giving the Estate to the next of kin &c as the old Statute; for want of brothers & sisters & their legal representatives, it gives the Estate equally to the children of such ancestor & those who legally represent them, from whom the estate came. And for want of such it goes to the brothers and sisters of the ancestor from whom it came. And it applies to the Children of such ancestor &c without any regard to their being next of kin or not to the intestate. — As if a man devises away his Estate from his children to his nephews, this Statute may take effect. — But if it came from the father, the new Statute makes no difference from the old. — By the new Statute the Estate may go to the ~~Children of the intestate~~ Children of the ancestor & their legal representatives, or to his Brother or sister & who there

may be nephews of the intestate living.

So long as there is any one living in the descending line no matter how remote, he will exclude all persons whatever, either in the ascending, or collateral line. And this whether the Estate was acquired by descent or purchase for it makes no difference. —

General observations upon the English law of Descents. —

It is necessary to understand something of this, not only because we should otherwise be at a loss to understand English books, but because in some of the U. States the Statute of Can. is adopted only in part, & the remainder is left to be governed by the English law. —

It is a maxim of the English law of descents that the heir must be of the blood of the first purchaser i.e according to the feudal idea lineally descended from him; if where it was *feudum novum* it would only go to the issue of the first acquirer; but if it was purchased by the intestate, by a fiction of law it is supposed to have descended from some ancestor, & thus all his relation would be let in, in their order. —

To be a little more explicit, if a man died of a feud of his own acquiring or *feudum novum*, it would not descend to any but his own offspring — no not even to his brother, because he was not descended, nor derived

his blood from the first purchaser. But if it was feudum antiquum that is one descended from ancestors, then the brother might succeed to the inheritance — as being of the blood and lineally descended from the ancestor. Vide reason in 2 Bl. 224.

But the rule as to property feudum novum, has since been evaded by a legal fiction, by granting the party a feudum novum to hold ut feudum antiquum, i.e. with all the qualities of a feud of indefinite antiquity. If here collateral were admitted to succeed "in infinitum" not because they are known to be of the blood of the first purchaser, but under a supposition that they might be so. Here the law will suppose any of the ancestors to have been the first purchaser.

The half blood to the deceased can never inherit. The property shall escheat first. — This is merely a positive rule in which there is no reason or sense. And another rule of this complexion is, that the estate shall never lineally ascend. —

Rules of Descent. —

We will suppose J. S to have died seized of a feud which he has acquired & which he holds as a feud of indefinite antiquity. 1. The estate goes to the issue in the lineal descending line and first the eldest son & his issue take the whole in exclusion of all the brothers and sisters. So that if the eldest son is dead his issue in infinitum exclude his uncles & aunts. —

Real Property. –

2 For want of sons & their issue, it goes to their daughters altogether in equal shares as copareners, & their issue per stirpes & never per capita

2. On failure of issue it goes to the next kinsman of the whole blood. Here the same rules are to be observed. It goes to the eldest male & his issue, & on failure of those, it goes to the females altogether. –

3. On failure of these it goes to the next kinsman of the whole blood, as uncles & aunts, preferring males & the eldest male; & if there are uncles on the fathers side, and by the mothers side. – Where they are equally related to the intestate. – In this case the preference must be given to the fathers line, & if there is no kinsman on the fathers side, then resort to the mother's line & pursue the rules there. Both males & females must be exhausted on the fathers side before you can resort to the mothers, the worthiest of blood being prefered. –

Rules of Descent under the Statute of New York. – – – – – – – – – –

1. In case of intestacy the property goes in the descending line, by representation ad infinitum exactly as under the Statute of Car. in England. –

2. In the ascending line the father takes all, & consequently the mother nothing, unless the Estate came to the intestate by his mother. – There is no provision in the ascending line but for the father & of course he only can take.

Real Property.

3. But in the collateral line, if the Estate came by descent, devise, or deed of gift, it will go to the brothers and sisters of the blood of the ancestor from whom it came.—

4. If the Estate came by purchase as under the Statute of Conv. it will go to the brothers & sisters of the whole & half blood equally excluding the mother in all such cases. If some or all the brothers & sisters are dead it will go to nephews & nieces per stirpes & never per capita

5 If it came from his mother, it will go to his brothers & sisters of the blood of the ancestor from whom it came.—

On failure of all these it will go according to the English law of descents.—

Of acquiring Property by Purchase.

There are 3 principle methods of acquiring Property by purchase 1. By Devise. 2. By deed. & 3 by operation of law.—

Acquiring property by operation of law means getting it by Judgment & execution thereon.— It does not mean property obtained to which one had a right before, as that obtained by an action of ejectment, but the right acquired in consequence of an execution, without any previous claim to the land.—

At Common law, a title to real property or lands, could not be acquired while the owner was living, but when he was

dead, the land would be liable to pay such debts only, as the heir to whom it descended were bound to pay. – In what cases then were the heirs bound to pay the debts of the ancestor. – They will be bound in all cases where the ancestor bound himself & his
2 Bl 246, 7. heirs, as in bonds & other specialties. – The land descending to the heir will be assets in his hands. The heir in such cases will be bound to pay from any lands descended to him & in his hands. – But in cases of simple contracts, no levy can be made upon lands to satisfy them. –

But how was it, if the heir to avoid paying such debts as he would be bound to pay sells the land to a bona fide purchaser. This was an inconvenience, to remedy which there has been a late Statute enacted in the reign of Wm 3 which binds the heirs to make payment to the extent of the value of the land sold. – This Statute to prevent frauds, subjects the lands (I presume) in the hands of the grantee. This is a question concerning which there has been a great variety of opinions: but Reeve thinks
3 Co. 11. the property liable in the hands of the purchaser. – In case of a
Co Lit 394. devise made to defeat the payment of just debts, the same Statute subjects in the hands of the devisee. —

And what kind of title or estate does this act? What an estate is vested will be by extending it. – To extending lands is meant appraising them at so much until the debt is paid. Whether a levy by an appraisement vests an Estate in fee simple, is

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now (Ei. 93) a great question in Virginia. There can not be easily determined, tho he seems to think that by such extent a fee simple was never intended to be vested in England.

It has been mentioned that in England a creditor could never levy upon the lands of a debtor while the debtor was living; altho his personal property could have been taken at any time. — Imprisonment in England can well be much more reasonable than it is here, where lands can be levied upon in the debtor's life time; for here if a man will not pay a just debt, his land cannot be sold, it is unreasonable to imprisoning him to oblige him to sell it. —

Levari-facias. There is a species of execution de terris et catellis called a levari facias on which the emblements may be levied upon. — But his land cannot be taken of a fee simple vested, but it may be appraised till until the emblements are cut and carried away. In this was cattle may be levied upon on common law. — But how where a debtor to evade pay on a levari facias leases the land & receives the profits himself; — Here the levari facias will extend to compel the lessee by giving him notice to pay the emblements to the creditor. This vests the right to receive the rents or emblements. —

Elegit. — In England there is another remedy on the payment of debts which is by Elegit Stat Westm. 2. But by this Statute a moiety only of the lands can be taken, & that moiety may be exten-

ded i.e. appraised off on the payment of debts. – Land thus taken is not considered as a lease on years, but it is held with the incidents & qualities of a freehold. Oxen, sheep, &c & all personal property may be appraised off under this Statute. These are the only methods of acquiring a title by operation of Law, to real estate in England. –

Venditioni Exponas. –

In most of the States in America the process is by a writ of Venditioni Exponas, by which the real property of debtors is sold at public vendue; & thereby a complete title in fee simple is vested in the purchaser. This is the law in most of the States but it is not so in New England. –

In Connt. there is but one express provision, which is, that all lands in fee simple (which J. R. supposes comprises 99/100 of the land in the State.) may be taken & appraised off which vests a fee simple as much as if there had been a deed given of the land in fee simple. –

The appraisers must be of the same County in which the land lies, because they are better acquainted with the value of the lands in that County than other men in other parts of the state. They must appraise of as many acres as the debt due amounts to. – This appraisal is returned (after being recorded in the town where the land lies) to the Clerks Office (if it issued thereon

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and there recorded at full length, which completes the title. — In Court. a Creditor cannot levy upon the lands of a debtor if a sufficiency of personal property be shewn. If it eventually turns out that there is not a sufficiency, when it was apparently sufficient, then the land may be levied upon.

Debtors and wives are exempt if there is enough personal prop. and, but if not, the giving up the body will not secure the land. i.e. the offering up the body will not exempt the land, if the land is desired; but both cannot be taken. —

But land is payment to be had even Estates tail, for life, in Dower & Curtesy, & Estates for years, seeing that in these the Statute has made no provision, & it is a fundamental principle, that all a man's estate must be subject to the payment of his debts. he must pay his debts &. There is a remedy & that is in extending such Estates, as other greater Estates. But none of them can be extended longer than for the life of the debtor, & none of them can be sold at the post. We see that all a mans hereditaments is subject to pay his debts whether that property be real or personal.

~~all a man's property~~ In America when a man is dead all his property of every kind is subject to the payment of his debts, which is not the case in England, for there even as in dead ~~death~~ real property will not be subject to pay debts on simple contracts. —

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The question has arisen in Canada, whether we can have any use for a levari facias, which is a levying upon emblements. J. R. is clearly of opinion that by levari facias would be the proper method of obtaining the emblements, for the practice here, is a very inconsistent one; which is by levying them on the land until ripe, at which time the Officer presumes them to be reaped, threshed, brought to the post & sold; which would be altogether unnecessary, could they be taken possession of by a levari facias on the land. —

In case of lease by the debtor J. Reeve supposes that the emblement should be levied upon by a Levari facias, tho this is not done, if were he again in practice, he would try the principle whenever an opportunity occurred. —

When a man argues a title to property by levy of an Execution for a debt due, the question has arisen, whether the levy puts him in possession, or whether it would be necessary to bring an action of ejectment to possess him of such property? It was formerly understood in Canada that possession was given by the levy of an execution — J. Reeve thinks that possession is not given by this process; nor ought to be, for the following reasons. —

1. Because some 3 person might claim the property and have a ~~just~~ title to it. — 2d. Because the title to lands is neo-

en brought in question by the levy of an execution; for the man who levies may omit some of the legal requisites; as omitting to have the levy of extent recorded; in which case it will be clear, that he has no complete title, & no man shall so far take advantage of his own wrong as to vest a title in himself when he has been too negligent to perform what was necessary.—

An action of ejectment will bring the title in question. With respect to this practice we cannot go the the English practice from the English books—

There is one great difference to be pointed out between a title acquired by deed, & one acquired by execution, as it respects the grantee in the one place & the creditor in the other.—

J. S. gives a deed land to Tom Stokes, Tom omits to do something requisite, as to get it recorded, & James Rowe knowing nothing of this takes a deed from J. S. of the same land in the mean time, & gets it recorded before Tom does his. Here James Rowe will unquestionably have a title. But suppose that Tom Stokes knew that James Rowe knew that Tom Stokes had in fact omitted getting his deed recorded: James would not in this case have a title for the law will esteem his knowledge of the transaction, sufficient to have barred him of taking

of the carelessness of his neighbour. — The scienter here is the "point" on which the case turns.

But the case of acquiring property by Execution is quite different. — Suppose Tom Yates is a creditor of John Yates. Tom levies an Execution on John's lands but neglects getting it recorded as the law requires. James Rowe is also a creditor, & knows that Tom has one levied, yet he is a careless kind of Fellow and has not got his Execution recorded, & levies an Ex. himself & gets it first recorded, here James Rowe has the title; for prior in tempore potior est in jure. What then is the reason of this difference? 1. In the former case, there was no Equity, for James Rowe had no claim, but in the latter James had as much an equitable claim as Tom. — 2 In the former there was a complete title vested at the Execution of the deed, for at Com. law a complete title vested at the execution of the deed, for at Common law a complete title passed without recording, recording was not requisite. In the latter there can be no title till all the legal requisites are complied with, for this is entirely a creature of the Statute. —

If Execution on a and wrongly Lands are claimed to which the Plaintiff had a right before. — as in an ejectment. — Here this is a special

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remedy, for the land itself is recovered. In the Execution the Officer is commanded to deliver the land into possession of the Pltff., for the title has been tried, & been found to be complete. But the Officer not only puts the Pltff. in possession, but puts every body out; & it is his duty so to do.

Forcible Entry. There is a case in which a man may have an Execution to put himself into possession without any the least enquiry into a title. To prevent quarrels, riots &c. the law will allow no one to be forcibly put out of possession: & if it is done, the person who did it shall not benefit himself thereby; but he may get possession by craft or cunning &c. and the law will not suffer him to be put out in this way, provided he does it peaceably. — If a man does thus forcibly put himself into possession a Court is immediately called which is known by the name of the freeholders Court (being generally composed of Justices 2 or more) this Court will immediately give Exct. to put the tenant thus turned out into possession. But however the person thus turned off by the execution has a good title he may afterwards recover: — for in the freeholders Court no title is ever gone into in case merely of a forcible entry; but in case of detainer the title is sometimes tried. —

Ten. Perpetuity. –

But what violence or force is it for the using of which a man may be turned off? The using any violent words or violent actions which may tend to terrify the tenant and drive him off. – If a man gets into possession without such words or actions, he cannot be turned out by this Court. – Bains Just. on Double Entry & detainer. –

Hawk.

Real Property.

Of Estates upon Condition.

An Estate upon condition is one which depends upon
Co Lit. 201. some uncertain event, by which it may be created, enlarged, or defeated.

Estates upon Condition are
2 Bl. 152 of 2 sorts. 1. Estates upon Condition implied, & 2 Estates upon Condition expressed. — Under the head of these, are included Estates upon Trust.

1. Estates upon Condition implied, are such as have
Co Lit. 215. some condition annexed to them from the very essence
2 Bl. 153. and nature of ~~which~~ the thing itself. — As the grant to a man of an office &c. Here it is implied on his part that he duties of the office shall be faithfully performed, & implied on the part of the grantor also, that he shall do no act incompatible with the nature of the Estate granted, — as the enfeoffing a stranger &c

2. Estates upon condition expressed, are such as have ex-
Co Lit. 201. press qualifications annexed to them, by which the Estates are to commence, be enlarged or defeated. —

Express Conditions are diversified into Estates upon Condition Precedent & Subsequent. The former, is where the event or condition must actually happen before the Estate can vest or be enlarged; as an Estate granted to B upon his marriage with C. provided he goes

to York &c.

An Estate upon Condition subsequent, is where
Lit. text 325. the Estat is vested, but upon the happening of some event,
Co. Lit. 207. or condition may be defeated: as where an Estate is granted
to A. upon the Condition of an annual payment of rent &c.
Here the Estate is vested. But where an Estate is granted
upon the Condition of a payment of rent, unless the grantor
7 Jam. 187. actually makes a demand of it at the day due, he can-
Co. Lit. 201. not after resume it. — The Condition is here construed
strictly against the grantor —

There is a distinction to be observed between an express condition in deed, & a limitation or condition in law. When an Estate from the nature of it cannot possibly remain or continue after the event has taken place, the qualification is called a limitation, i.e. where it is not necessary for the grantor to do any act in order to revest the Estate. The words "so long" "while" "until" are words of limitation.

But if the qualification annexed is a condition in deed the Estate does not cease immediately or of course after the
2 Bl. 155. happening of the Condition. Entry or claim is necessary in the
& Co. 41. grantor or his heirs to revest the Estate, & this is called a condition
Lit. text. § in deed. — The words "provided" "upon condition" "so that" &c are
375. 7 Co. 7. terms of Condition
3 Burr. 711.

The distinction between a Condition & a limitation

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tion altho' it would seem to be merely verbal, yet it is very important. It is not universally true that these words of condition, as provided, so that, &c operate as words of condition, for it is a rule that where an Estate is granted over to 3d persons these very words will be construed as words of limitation. — The reason is, because the grantor or his heirs may neglect to take advantage of the non-performance of the condition, & therefore 3d persons shall not be prejudiced by the negligence of others. —

2 Bl. 152.
1 Co. Int. 202.
Co. Lit. 205.

It has latterly been settled, that an express condition, that the lessee of a ~~tenant~~ term shall not assign it, is good; & therefore he should make an assignment, it will be a forfeiture of the term. —

2 Sam. 138.
8 do. 61. 61.
2 Wh. 119.

But if a lease is made to A & his Executors, with a condition that his Executors shall not assign, without ~~an licence or when estate~~ it is a question whether they may not assign, without a forfeiture of the estate. The better opinion however seems to be that they may assign, such condition notwithstanding.

2 Sam. 140.
425.

A are holding an Estate for life appears under a deed, which is void, & he attempts to assign under such invalid instrument, this attempt to assign will not destroy his Estate. —

3 Sam. 641.

It has been settled that a lease made with proviso, that the term shall not be subject to bankruptcy

8 Sam. 61.
9 do. 133.
6 Co. 4

it will be good. —

It seems also that it may not be taken under an Execution by the Creditors to the lessee.

If an express condition subsequently annexed to an estate be impossible at the time of its creation, it vests the Estate intended to be given upon condition, in the lessee, or grantee, for such a condition is void. —

So also if the condition becomes impossible by the act of God, or by the act of the grantor, the Estate becomes absolute, for the party to whom the estate is granted shall not suffer by the laches of another, when the former has done what he can. —

Co Lit 201. 206

So also if the condition be against law, or repugnant to the nature of the Estate granted, it will be illegal & void, and therefore an absolute state will vest. — Here the dictate of sound sense is followed, for there never should be a temptation held to commit an illegal act.

The preceding cases are conditions subsequent; but as to conditions precedent there is a material difference; for in condition precedent, no title can possibly vest at all, whether the conditions be unlawful or impossible. If it is impossible it clearly cannot, because the creation of the Estate primarily depends upon the impossibility. — If it be unlawful the Estate can never vest, because the law can never recog-

Co Lit. 206.

-nige a title which is repugnant to itself.—

Powl. 54. The performance of a condition either precedent or subsequent is matter in pais, & of course provable by parol

Bacon 90. evidence.—

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Mortgages

Estates held in pledge are of two kinds, the first of which
Dav. 76. is called Vivum vadium, or living pledge, which is an
3. 4.
Co. Lit. 205 estate granted by a debtor to his creditor, to hold until the
2 Bl. 157. debt is paid or satisfied. This species of pledge is called a living pledge because the thing pledged survives the debt and when it is discharged the property revests in the grantor.

The second kind of pledge is called Mortuum vadium, or dead pledge, and is an estate granted by a debtor to his creditor, upon condition that if the debtor pays the
Dav. 4. debt on a certain day, the estate shall become void, in
Lit. Ent. 332.
Co. Lit. 205. one of three ways. 1st That the mortgagor shall re-en-
2 Bl. 157. ter, or 2dly. That the mortgagee reconvey or 3dly. That the mortgagee shall disclaim all interest in the premises.

It has been ~~[illegible]~~ observed that conditions either subsequent or precedent being matter in pais may be proved by parol evidence, so in mortgages the extinguishment of the debt, for which the estate is given, is provable by parol testimony, and the estate thereupon revests; therefore a clause or provision for a reconveyance is merely a cautionary step.

2 Bl. 158. It is called a mortgage, because if the mortga-
Dav. 4. 18. 168. gor fails to make the payment, the estate as to him
17. 2. 56 a is gone forever at law.

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Mr. Jacob observes that when the question is asked how many kinds of mortgages there are, it is generally answered that there are two; viz. vivum vadium & mortuum vadium. This is he says incorrect for to say that a living pledge is a mortgage is as absurd as to say that a living man is a dead man. A recurrence to the derivation of the word will show this.

A mortgage then is substantially an estate pledged by a debtor to a creditor as a security for a debt. — The word "mortgage" can refers to the estate pledged & not to the deed, as is often understood — The deed then should be called a mortgage deed instead of a mortgage.

The debtor ~~or creditor~~ or maker is called the mortgagor — The creditor or grantee is called the mortgagee

Every mortgage then is an estate pledged upon condition, and this condition is usually called a Defeasance, because its office is to defeat the estate granted to the Mortgagee.

There is no precise technical form indispensable in
Ins. 5. making a mortgage deed — The defeasance may be a distinct instrument, it may be in the body of the deed, or it may be annexed to, or indorsed upon it; for it is a rule that two instruments executed at the same

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time, and referring to the same cause, make but one contract.—

Bl. 158. As soon as the estate is created, the mortgagee may
Rw. 14.66. take possession, tho' he is liable to be dispossessed.—
79.

The usual & almost universal practice is, for the mort-
Fub 255 gagor to remain in possession until the condition is broken.—

Lit Ex 335 There is a distinction at Com. Law between a
338. grant made to secure a gift, or gratuity, and one made to secure an antecedent debt.

In the former a tender made, not only discharges the hen or debt but the whole obligation. The promise of a gratuity or gift does not in fact create a legal debt. In the latter a tender at the day fixed, of the money does not discharge the debt; it still remains a legal debt being already created.—

Co. Lit 205 The condition in a mortgage deed is always a
206. 213. 221. condition subsequent, altho formerly it was considered as a condition precedent.—

Formerly after the condition was forfeited, the wife of the
Prwel. 7. Co Lit 221. mortgagee was entitled to dower in the mortgaged estate,
222. and it was subject to all the covenants &c of the husb-
1 Cas ab and, & for this reason it is customary in England to grant
311. very long terms for years by way of mortgage. And this

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continues to be the practice in England, altho' the reason which gave rise to it has ceased, for the wife is not entitled at this day to dower there, in such estate.

1 Leo. 16.
3 Ket. 387.
Cro. 10. 12
Lev.

Mortgages in Con. are almost always in fee simple.

If a bond is given to a mortgagor, conditioned for the performance of the covenants &c contained in the mortgage deed - non-payment at the day is a forfeiture of the condition of the bond - this was formerly decided contrary, as in Cro James. 281. Jct. 206.

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How mortgages are considered in courts of Equity.—

It has been remarked, that at common law, if the condition is not strictly performed, the land or property mortgaged, vested absolutely in the mortgagee or grantee— A very grievous hardship was the consequence of this for a large & valuable estate would not unfrequently be lost for a trifling sum— Concerning this there was a great controversy between the Courts of law & Chancery— The former contending that upon a breach of the condition, the thing mortgaged was gone from the mortgagor & vested absolutely in the mortgagee without the possibility of a redemption; the latter (Courts of Chancery) contending that the transaction was wholly a mere personal contract, & the land or property only a security for the performance of the condition— So that the mortgagor was actual owner of the land, notwithstanding the nonperformance of the condition.

Prw. 14. 169. 170. 475.

Prwel. 14. 15

In this contest as with all others between Courts of Law and Chancery) the Courts of Chancery prevailed. and in consequence thereof, Chancery has cognizance in equity of all matters concerning mortgages. Equity considers that whenever the debt is paid the interest—

Prw. 5, 5.

475.

Prw. 14. 15.

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of the Mortgage determines, and if it is not paid and there is a forfeiture of the condition, the Mortgagee becomes trustee of the legal estate for the Mortgagor.—

As then in Courts of Equity the whole transaction is considered as a personal contract, and the land as security for the performance of the condition, the debt is the principal and the land or estate is the incident, & "Accessorium non ducit, sed sequitur suum principale"—

This equitable right which resides in the mortgagor after a breach of the condition is called the Equity of redemption; some see that it is merely a creature of the Courts of Equity.—

Pa. 266. 2. 256.

But altho the land is considered as the mortgagee's property until the redemption, the mortgagee's interest continues in Equity, so far as to entitle him to the proceeds, and of course the possession—

Pa. 106. 2. v. 15.

From this view of the subject it may be inferred, that a mortgage is not such an alienation of the property as to alter any previous disposition, except so far as any previous disposition is necessarily affected by it.

Pa. 242. 329. 2. Pa. 449.

It is an alienation pro tanto, i.e. to the amount of the debt for which the property is mortgaged to secure. So also in case of devise.— Mortgages will

2. Dev. 614. 618. 579. 2. Pa. 798 1. Pa. 606.

only affect them pro tanto, and will not be considered as a total revocation. It is however a rule on devises that any subsequent disposition of property devised will be at law an entire revocation; but in equity it is clearly settled to be a revocation pro tanto only—

But still if the owner of land devises it to A. and afterwards mortgages it to A. it is a total revocation of the devise even in equity; for it is said that A. cannot stand in two characters, i.e. as mortgagee to himself. But Mr Gould does not believe the rule to be founded upon this seemingly technical absurdity; it proceeds upon the presumption of an intention in the party to revoke, and the presumption of such an intention cannot be rebutted.—

Re, in Ch. 514. Gro. J. 49.

Every contract for the loan of money or payment of a debt secured by the conveyance of real property and not intended to be conveyed in fee &c, is a mortgage and so considered.

2 Atk. 495.

It is also a rule that all private agreements between the parties, made at the time of the mortgage against claiming the equity of redemption are void. For were they suffered they would enable mortgagees to take unreasonable advantage of Mortgagors, for

1 Ban. 33. 1902. 2 Vent. 364 Saw. 1921. 28. 38.

mortgagors are considered very much at the mercy of the mortgagees — The maxim "once a mortgage always a mortgage" applies here; and it is really true that where a condition is added to a mortgage deed, that "if payment be not made at the time limited, the land should be considered as sold" such condition would be void —

2 Ban 84. As to this point it makes no difference whether
2 Eq. ca. ab 599. the proviso is in a mortgage deed, or in a subsequent instrument. —

5 Ves. 488. 138. The rule proceeds further still for if there is an agreement at the time of making the mortgage deed that
2 Ves. 520. the conveyance shall become absolute, provided the mortgagee advance an additional sum of money it will be void — such agreements are considered as radically vicious —

But still an agreement that in the case of the sale of the equity of redemption, the right of pre-emption shall be reserved to the Mortgagee will be good — such an one cannot be oppressive —

So also, a subsequent agreement for an absolute sale executed by the parties, is good: that is, it is not necessarily void, but subject to the

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avoided when there are any badges of fraud—

So also if the mortgagor make a subsequent release of his equity of redemption, and agree for a reconveyance— This agreement will be good.—

Conditions precedent are construed strictly; but conditions subsequent are construed liberally—

There are also other exceptions to this general rule, that "once a mortgage always a mortgage;" as in cases of family settlements— Any settlements thus made, as charitable or gratuitous, will be good; as where the estate is settled that the equity of redemption shall not be claimed except during the life of the mortgagor—

These being gratuitous acts of the mortgagor, shew him to be in such a situation as that the mortgagee cannot take advantage of him, and render them good, an exception to the general rule above—

According to rules observed in the Court of Chancery an absolute deed, without any defeasance— may be considered and treated as a mortgage where there are any circumstances which induce a belief that the equity of redemption should be claimed— As where the grantor or mortgagor is suffered

Prec. 65.
Talb. 6.
2 Atk. 71.
3 Wms. 220.

to remain in possession - to pay no rent, but pay taxes. The Superior Court have decreed in two instances accordingly upon this ground, and Mr Coulie thinks upon principles of the highest justice; for the Statute of frauds & perjuries is but a rule of evidence, and a rule of property. The Court of Errors have as often reversed their determinations. This is therefore left in doubt.

Bel. 526

But parol evidence is clearly admissible to prove a payment, and is therefore sufficient to defeat the interest of the mortgagee.

Mo. 53.

If after the mortgagee has voluntarily forgiven the debt, parol evidence will be admitted to prove it.

Benard. 98, 8.

But a parol assignment between two co-obligors that the whole shall rest upon one of them will be within the Statute of frauds & perjuries, therefore parol evidence cannot be admitted to substantiate it. If lands are devised to certain trustees to hold until the rents and profits shall discharge certain specified debts, and no power is given them to mortgage by the instrument of devise expressly to mortgage the lands, yet if a sufficient sum cannot be raised within a reasonable time to pay the debts from the rents & profits, the estate may be mortgaged

or even sold for the payment of them, unless it clearly
Re Ch. 397. appear from the instrument ~~[illegible]~~ of devise, that the in-
2 Ven. 310. tention of the devisor was otherwise.—

Of the interest of the mortgagor in the premises mortgaged.

Pow. 66, 7 As soon as the estate is created the Mortgagee has mort-
60 J. 659. 660 gagee may have immediate possession, but if there is an
2 Bl. 158. agreement that the mortgagor shall remain in possession
for a certain fixed period of time he is tenant for years
to the mortgagee. But if the mortgagor is left in posses-
Doug. 21. 270. sion without any agreement as to the time, he shall
remain in possession, so far as it respects the right of
Cru. 659. the mortgagor he is tenant at will, or quasi tenant at
will to the mortgagee; he is not tenant at will in every
particular, for he may be sued in ejectment by the mort-
gagor without notice, which is not the case with a com-
mon tenant at will.—

But on the other hand a mortgagor thus in possession
is not liable for rent to the mortgagee, as other tenants at will
are. The rents and profits are suffered to be taken by the
mortgagor in lieu of interest paid to the mortgagee

Doug. 22. 266. On the other hand such tenant is not entitled him-
self to the emblements after ejectment for all the profits

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are to go towards paying the debt — So upon the whole
Pow. 67, 8. the mortgagee loses nothing by not being able to claim
70. rent. —

Cruo. 22. Again a common tenant at will cannot lease
Gilb. 80. or underlet the land, but it is otherwise with mortga-
Cro. 606. gor in possession, for such lease will not determine his
1 Cro. 97. possession, but the mortgagee may if he pleases defeat
Pow. 75 the lease against the lessee, for the lessee stands in
the same situation as the mortgagor —

Such a lease will be good against the mortgagor, and
all strangers, and will entitle the lessee to the equity of
redemption.

Pow. 68. 80. As the mortgagee has it at his election to
1 Atk. 606. treat the lessee as a wrong-doer or not, it follows
Cruo. 266. that by giving him notice, he may treat him as ten-
ant, and compel him to pay <u>rent</u> arrear. But he
cannot be compelled to pay rent which he has paid
1 Ch. Ca. 60. to the mortgagor, for he would then be paying it twice
do. 480. It is now settled that the mortgagor when sued in
1 Ven. 258. ejectment by the mortgagee, cannot set up the
Cro. 470. title of another as a defence, for he is estopped to do
2 Bl. 808 this by his own deed — Bl. 808.
or 295.

So on the other hand the mortgagor is estopped to
deny the title of his own lessee, while the lease continues

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for his title is good against the mortgagor & against all
Cro. 304. strangers. From this it follows that this possession will en-
Dow. 75. 10 Cook 59. title the lessee of the mortgagor to sue any stranger in ejectment,
for this being a lawful possession it is alone sufficient for
this. –

3 Inv. 106. The mortgagor being deemed in Eng. the true owner of the land
Co. 109. and the interest of the mortgagee a mere chattel interest as
2 Ves. 304. security for the payment of the debt, it follows that if
2 Burr. 978. Dow. 170. a freehold is mortgaged, the right of redemption remains
2 Burr. 610 in the mortgagor, & his interest will descend to his heirs,
2 Atk. 294 or 61. it will pass by devise, and whoever possesses this right
3 P. W. 341. or interest against a settlement thereon. The only differ-
-ence between this interest and a real freehold, is that in this
the title after for future or breach of the condition
cannot be entered at law –

But tho' the mortgagor is considered as real
2 Atk. 25. owner, yet if he commits waste an injunction will issue com-
Dow. 75. -manding to stay it – even tho' the mortgage is for a term of
years, which cannot be done in case of common tenants
for years – Quere.

All the foregoing rules were devised and adapt
2 Bl. 158. ed for the purpose of coming at what may be called,
substantial and real right –

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C. The interest of the mortgagee.—

The interest of the mortgagee in the premises mortgaged may be considered at four different periods of time. 1st the interest of the Mortgagee from the time of executing the mortgage & before ~~performance~~ forfeiture of the condition while possession is as is usually the case in the Mortgagor. 2dly After the mortgage is forfeited by non payment of the money at the day & before the mortgagee enters into possession.— 3dly After the mortgagee enters into possession, & before foreclosure. and 4th. & foreclosure, of which 1st. & 2d. will treat hereafter.

A. Of the interest of the mortgagee between executing the deed, & the forfeiture of the condition.

Before forfeiture the Mortgagees estate continues what it was at Com. Law before Chancery interfered. The legal title is in the Mortgagee, tho it is defeasable on performance of the condition. It is the equitable title which results to the Mortgagor after breach of the condition which gives Chancery cognizance of ~~this~~ Mortgages— This court then has no

Pw. 79. 80. 156. 228. 2 Vern. 156. Fel. 445.

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sort of concern with them until breach of the condition.

Hence any conveyance or any lease made by the mortgagor, during this period, is void as against the Mortgagee.

Com. 22. Hence also the mortgagee may on notice
Cro. 80. compel the Mortgagor's lessee to pay him the rent,
Lev. 266. even before forfeiture of the condition.

And this rule holds as well where the lease is prior to the mortgage, as where it is subsequent to it. But Chancery sometimes that rent could not be compelled to be paid by the ~~mortgagor~~ lessee, which had accrued before the mortgage made.

When a term for years is mortgaged by the lessee the Mortgagee is in the nature of assignee of the term, provided the whole of the term is mortgaged; and if the whole is not mortgaged, he is liable as derivative lessee, but not in the character of assignee.

2 Sem. 275. But such mortgagee is not liable for covenants
374. which run with the land, unless he takes actual pos-
Lev. 458. session of the premises and the reason is, that the
744. Mortgage is regarded only as a security.
Pow. 85. 92.

This rule holds as well after forfeiture, as before.

Lev. 92. But if the Mortgagee does take possession, he is liable for all the covenants that run with the land, like

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other alienees, for he takes it cum onere, and enjoying the rights he must submit to the losses.

2.4. The two next periods of time, will be considered together; the distinction being marked where any occurs. That is the interest which the Mortgagee has after forfeiture, and before possession, and after possession and before foreclosure. The interest between these periods is considered by courts of equity as a chattel interest.

1 Ch. 595.
2 Ch. 610

Bac. 76.
2 Ver. 621.
5 Ch. 3.

The interest of the mortgagee will pass under a devise of lands before forfeiture. 2 Cont. 551.

If then the mortgagee dies at any time between forfeiture & foreclosure, his interest will go to his personal representatives; and on the same principle of considering it a chattel interest, it follows that the assignment of a debt does in itself convey this interest.

2 Ver. 548.
455.
454.

1 P.W. 458.

Bac. 93.

Bac. Ab. 660

Some also the Mortgagee before foreclosure must not do or exercise any act of ownership which will injure or incumber the mortgagor's interest.

In such a case as this, however, the chancellor observed that a case would be good, if made to avoid a forfeiture. I myself think this dictum is doubtful in its nature, if not bad.

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As the mortgagee before foreclosure cannot do any act
2 Vent 392. that will incumber the mortgagor's interest req-
592. uisite, therefore he cannot before foreclosure commit
3 Atk 723. waste, for if he does a person will issue an injunc-
tion to stop it. This rule holds as to mortgages in fee—

But if the mortgagee's security is defective, a
Pow. 95. Mortgagee in fee will not be restrained from commit-
ting waste even before foreclosure — But in all
cases where he does commit such waste he must
3 Atk 723. account for it, for it must be applied to ease
the estate, and not to the mortgagee's benefit—

But tho' the Mortgagee cannot incumber the
3 Atk. 518. 504 estate, yet he will be allowed expenses for making
2 Ven. 84. necessary repairs — These expenses are to be added to
Ibid 34. the principal of the debt against the mortgagor, &
it will bear interest—

If a mortgage is made of an estate to which the
Mortgagor has no title, and afterwards the true owner
Pow. 97. conveys it to him, the Mortgagor, the Mortgagee shall
have the benefit of this, & it is called a graft upon the
2 Ven. 11. old stock.

The Mortgagee is not bound to extend money
3 Atk. 518. upon the estate except for necessary repairs; nor however

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If he does expend money in defending the mortgagors title he may add it to the principal, for it is to be remarked that if the title is attacked it is at the risque of the Mortgagor.—

The Mortgagee takes the estate mortgaged subject to the same incidents, to which it is incident in the hands of the Mortgagor.—

If the mortgagor has done any act, that amounts to a forfeiture, the mortgagee will loose his security.— Mr. Gould apprehends that the following distinction will hold,

2 Sw. 540. Ch. 541. 5 T. 2. Dow. 99. 111. con. a. Rep. 108. 108.

that when the mortgagor has done any act which is inconsistent with the nature of the estate, it will be a forfeiture contemplated by the rule: but where the forfeiture, is the commission of any offence, it is not such an act as will affect the mortgagee's interest. In the last case the forfeiture does not arise on account of an injustice done to the remainderman &c. and the King can take only what interest the mortgagor had.

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"Of the Equity of redemption, & who may claim it."

The equitable interest which results to the mortgagor after breach of the condition, by non payment at the day appointed, is called the Equity of redemption. —

2 Atk. 526. This interest is properly speaking a trust. The legal estate until foreclosure is in the hands of the Mortgagee as trustee ~~and~~ for the Mortgagor.

2 Atk. 606.

A mortgage really, is often the forfeiture, completely a trust, a definition of which is, the legal title is in one for him to hold, till a certain purpose is answered, and then to be conveyed to another.

1 Ban. 193. As the Mortgagor may redeem at any reasonable time by paying the debt and interest, so may any one claiming under him. As where there was a voluntary conveyance, and afterwards a ~~conveyance~~ mortgage of the same premises to another; this altho' it was fraudulent against the Mortgagee, yet it was good as to the equity of redemption, and would pass that, for a voluntary deed will bind the party that made it and his heirs —

1 Ch. 71. 1 Ch. 316. Pow. 108.

A second mortgagee may redeem of a first mortgagee. So a 3d. of a 2d. &c. for the rule is that any person having the same interest which the mortgagor

Pow. 168. or. 108.

had may redeem.

1 Vern 33. 190. 2 Doug. 22. The assignees of a bankrupt may redeem or assign an equity of redemption

So also the lessee of the mortgagor may redeem. So a purchaser or assignee of a mortgagor may redeem. 2 Ves. 304. So also after the death of the mortgagor, his heir may redeem.

If the interest mortgaged was a freehold, and descendible, the equity descending will be real assets.

An equity of redemption of a mortgage in fee, is governed in the same rules of descent, by which the legal estate is governed. Prec. 109. 2 Ves. 304.

And as an equity of redemption is devisable, a devisee of the mortgagor may redeem, for he has the same interest which the mortgagor had. 2 Bac. 978.

Let bro. have also a judgment creditor of the mortgagor may redeem, because a judgment obtained is a lien until that is done. Co. Lit. 102. 3 Bl. 402. 1 Vern. 111. 3 Atk. 200. 1 Vern. 399. 2 Atk. 440.

Altho a judgment creditor in Connecticut, cannot redeem as such, yet if he has actually levied the execution, he may redeem, for the levy gives him an ~~equity~~ interest in the equity.

It has been a matter of much doubt in Connecticut, with respect to the way in which an

equity of redemption shall be levied upon. Two different practices have obtained. The first is if the execution debt is large enough to swallow up the whole of the equity of redemption, the whole is to be levied upon and appraised off to the creditor, and this extinguishes the mortgagor's interest; but when the debt is not equal to the equity, execution may be levied upon a part, and that appraised off to the creditor.

The second method is to appraise of the whole equity of redemption to the creditor, whether the demand is great or small, without entering into any inquiry what the value is, and in this case the debt from the mortgagor to the creditor is not extinguished, nor the right of redemption taken from the Mortgagor, but such levy places the creditor precisely in the same situation as if he had been a second mortgagee, and hereby he gets security for his debt to the extent of the value of the equity which may be redeemed by the mortgagor if he ~~pleases~~ chooses, but the levy does not operate as an absolute sale of the equity to the amount, but as if the Mortgagor had given to the ~~se~~ ~~cond~~ creditor a second mortgage —

1 Bro. P. 22. In Eng. the King may also redeem when the mortgagor has committed any offence which works a forfeiture

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Tenant by elegit, Statute Merchant or Staple may redeem

Pow. 110.

If a mortgaged estate or equity of redemption descends to an infant, his guardian may without the direction of a Court of equity apply the profits to the discharge of the debt.

Ch. 137.

Pow. 112.

After the death of the mortgagor his widow may redeem, if she has a jointure in the land, and altho the jointure be secured only on part of the estate, yet she may redeem the whole. If she pays more than a third part of the principal money, she shall hold the land until reimbursed. It appears that if the mortgagee requires it she must redeem the whole.

Hen. 33
193.
Hegan 219.
Hen. 191.

The husband of a mortgagee may redeem after the death of the wife by the curtesy of the equity of redemption.

Pow. 112.
Ch. 605.

But in order to entitle the husband to this there must have been a seizin of the wife during coverture i.e. not a corporal seizin, but an equitable seizin; and it would seem that the perception of the rents and profits would have been a sufficient seizin.

Strs. 98.
307.

A subsequent incumbrancer may redeem of a

former one.

If a subsequent Mortgagee redeem of a first, the Mortgagor or his heir, or his devisee may redeem of him. It is in fact a rule that property in this situation, may be redeemed, until it is redeemed by the one who is entitled to the whole interest legal & equitable. For if the lessee of the mortgagor redeem, still the mortgagor may redeem of him — but when the mortgagor or his heir or assignee redeems, he will revive the whole interest — therefore there will be an end of redemption.

Pow. 119. 1 Ch. ca. 107.

A Mortgagor may redeem even after a release of the equity of redemption, if it appears from circumstantial evidence, that it was made upon a secret trust for his benefit.—

Pow. 120.

So where a tenant for life with remainderman, or reversion in fee of an equity of redemption, they shall contribute proportionably what is due on the mortgage —

So a devisee of an estate for life in an equity of redemption may redeem and hold over until those in remainder contribute.

3 Ch. 62.

And if the remainderman or reversioner will neither of them contribute, the tenant for life may

hold the land until they pay 2/3 of what is due for principal and interest.

In precedents in Chancy. 44 it is advanced that a tenant for life is to pay 2/5. Mr. Gould
Ch. 44. think this incorrect, but believes one third to be exact proportion.

Ch. 62. The general rule is that the estate of the tenant for life in the premises shall be rated at one third, and that of the remainder man or reversioner at 2/3 of what is due for principal & interest.

Pow. 121. 442. If the mortgage money is payable on a contingency not arrived, he in remainder or reversion may exercise a bill in Chancery called a quia timet against the tenant for life and compel him to contribute: that is that he shall pay one third using his interest in the premises, or else relinquish the possession. The object appears to be to compel the tenant for life to keep the interest down & the land be charged; for he cannot be directly ~~to redeem~~ compelled to redeem, tho' he might indirectly by purchasing in the mortgage.

Vineral. 185. 2 Eq. cas. ab. 596. 511. If the tenant for life or the equity of redemption, pay off the whole debt, and takes a conveyance of the estate, makes improvements thereon

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and dies. afterwards the remainder man or reversion-
Pow. 121. er, comes to redeem, they must pay 2/3 of the last-
242. ing improvements to his representative, but no-
thing for the other 1/3 because he received the
benefit thereof during his life, and no interest
shall be allowed during the life of the tenant
for life, for the money he paid, for he is bound
to keep the interest down during his estate.—

But as to the proportion of money to be paid, between
the tenant for life & the remainder man, this dis-
tinction is to be taken — as has been said if after
redemption by the tenant for life, the remainder man
applies to redeem during the life of the tenant, the
tenant is to pay only 1/3.

But if the application is made after the death of the
tenant to his representatives, they must allow only
Ram 484. for the time, the tenant for life enjoyed the es-
tate, and the remainder man would consequently
be subject to a greater distribution than in the for-
mer case.

2 Atk. 294. The equity of redemption on a mortgage in fee-
2 Vern. 61. is not assets at law, for there the estate of the mort-
5 Ves. 411. gagor is gone entirely, the very moment that the
4 Ch. equity of redemption commences — still, however

such equity of redemption is assets in Chancery, and if an heir aliens or releases his equity of redemption to prevent creditors from having satisfaction for
3 P. W. 341. their debts, Chancery will follow the money, in the hands of the heir or Exr. —

2 Bl. 511. As however an equity of redemption is only equitable assets, and cannot be touched only thro' the interposition of Chancery, the creditors are to be paid pari passu pro rata without respect to the degree or quantity of their debts.

In bankruptcy all equities of redemption are
Sedgw. 410. real assets i.e. assets at law. An equity of redemption may be
2 Atk. 354. attached as common law property, as a way of execution, levied in the same manner as real property is levied upon — and an Exr. when he makes out an inventory must include the equity of redemption — Even in Eng. the mortgagor's reversion expectant on a mortgaged term for years will be assets at law, liable to debts, and will attract the redemption. —

So also the reversion of a chattel interest expectant on the determination of a mortgage of part of the estate, is assets, but it is assets personal in the hands of the Exr. —

In the former case the reversion expectant is real,

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and therefore would be assets in the hands of the heirs & not of the Exr. —

1 Vern. 134. The judgment in these cases will be of
Pow. 136. assets quando acciderint viz. when they fall & the creditor cannot say a bill in Chancery compel the heir to see the reversion — but must expect until it falls

Hardr. 469. The equity of redemption is devisable, or the payment
Stamb. 1. of debts, if it is in case of its being descendible that it
2 P. W. 412. becomes equitable, if not legal assets —
2 Atk. 56.

It was once supposed that if a devise was made to
1 Com. 63. 101. an Exr. the estate with a view would be legal assets.
Eq. ca. ab. 371. But it is now settled that such a devise, either to
the Exr. or any third person shall be considered as equita
1 Com. 63. 101. ble assets and shall be paid to the creditors "pari
1 Mod. 117. passu".

[illegible] as such have no priority when the land consists of equitable assets — yet a second mortgagee shall be preferred to any other
1 Vern. 101. creditor, for he has priority not as a creditor, but as an incumbrancer having a specific lien on the land —

2 Atk. 272. The equity of redemption has never been held to be liable to a bond creditor during the life of the mortgagor —

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It has been a great dispute in Eng. whether there can
Cox. 132. be a "professio fratris" of an equity of redemption. The
better opinion seems to be in the affirmative.—

1 Atk. 604. If a man has a son and a daughter by one wife
Co. Lit. 4b and afterwards has another son by a second wife, if
3 Co. 124. the eldest son dies seized, the estate goes to the
Cox. 58.— daughter in exclusion of the half brother. This is
called "professio fratris;" but if the eldest son had
never been seized, the younger brother would have
taken, because all descents are from the person
last seized.—

Cox. 132. [illegible] in the [illegible] case, where
1 Atk. 604. 605 if the eldest son died in possession, could the daughter
take? Lord Hardwicke was strongly inclined to think
she could not, but the current of authorities are
against him.

For a definition of professio fratris vide
8 Tho. Rep. 213.

2 Eq. Ca. Ab. 605. In general no person is allowed in equity to
redeem unless he is entitled to the legal estate accor-
1 Vern. 182. ding to Powell, but Lord Hardwicke thinks this to be ab-
Pow. 133. surd, for he that has the legal estate needs no re-
demption. What Powell means must be this, that
no person shall be permitted to redeem, unless he

has an interest in the equity of redemption, - which ought to have been the rule. -

That if he in whom the equity of redemption is refuses to redeem any person, either directly or indirectly interested, will be permitted to redeem. -

Where a mortgagor becomes a bankrupt, if a majority of the creditors would not suffer the assignees to redeem, the other creditors were permitted to file a bill for redemption under their own costs -

If the mortgagor's heir in whom the equity of redemption is, will not redeem the creditors have no right to interfere. I suppose the rule contemplates simple contract creditors. It is a leading maxim of the law of Eng. that the right of redemption is a creature of equity, a Court of equity will always make it subservient to its own rules -

2 Vent. 350.

Cowp. 601.

It is also a leading maxim that he who seeks equity must do equity - Hence it follows that a Court of Chancery will decree a redemption, either absolutely or conditionally as the justice of the case may require.

The right of redemption is not then absolute - If therefore the mortgagor should apply to redeem, on payment of the debt, provided he should not be able to set aside the mortgage at law, the Court will not

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indulge him, for he must relinquish his suit at law, on his application to a Court of Chancery.—

2 Ven. 526. So if having applied previously to a Court of law, and failed, the mortgagor applies to a Court of equity, the Court of equity will compel the applicant to pay the cost and charges of the suit at law—

1 Ven. 232. 183. 394. Again; altho' the Mortgagor cannot compel the mortgagee to redeem before day of payment, yet in case of a hard bargain against the mortgagor, he will be permitted to redeem before that time.—

2 Equit. 599. Again; if the mortgagor should obtain possession against the Mortgagee by Legal, pending a suit, on petition for redemption he must restore the premises before he can redeem.—

2 Ven. 297. 386. In pursuance also of this it is a rule that if A. mortgage Blackacre for one debt, and White acre for another, and one is more than sufficient to secure the debt, & the other security less than sufficient, he cannot redeem the sufficient one without redeeming the other at the same time.—

1 Ven. 246.

So if the heir of such mortgagor wishes to redeem.

So where the heir of such mortgagor endeavours to defeat the Mortgagee of one of the estates by setting up an entailment & afterwards applies he shall redeem

1 Equit. 325, 7

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Pam. 245 both or neither. — Pow. 140.

A purchaser under the mortgagee shall hold the
1 Pam. 476. land against the mortgagor and his heirs for the sum
1 Salk. 155. due on the mortgage, altho' he may have bought it for less money, or given more than it was worth, for he stand in the shoes of the mortgagee, who assigned, and who might have given it to him gratis.

2 Vent. 353. But as against subsequent incumbrancers, or cred-
1 Pam. 49. 336. itors the purchaser shall hold for no greater sum than
464 476. he actually paid.

So also if the heir of the mortgagor purchases
Salk. 155. the first mortgage at a discount, this incumbrance
1 Eq. ca. ab. 330. shall not stand against a subsequent one for more than the sum paid.

It is a general rule that if an heir at
10 Pam. 49. 335.
law, trustee or executor, assignee &c. of the mortgagor, pur-
2 Atk. 54. chase in the mortgage at a discount, the creditors & legatees shall have the advantage of it — and for want of them the benefit shall go to them entitled to the surplus.

This rule applies as well to assets generally as to mortgages.

These rules are all founded upon the general principle first laid down. viz. that the right of re-

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demption is a creature of equity; & the Courts of Cha.
Pow. 143. will always make it subservient to its own rules.
5 Ven 49.

But if the mortgagor's heir buy in incumbrances to protect others to which he himself is entitled the whole money due shall be allowed on account, altho it was purchased for less—

Mr. Gould thinks that in this case the general principle has not been rightly followed; why might not the doctrine of taking securities be applied here? & why should the heir or trustee be allowed to hold, not having paid and adequate or
Pow. 145. equitable consideration against bona fide creditors?
P. Ch. 511. What distinction is there in principle between this & the case of an ordinary purchaser, except so far as as it goes to protect his own incumbrance?—

If the mortgagor becomes indebted to the mortgagee otherwise than on the mortgage, the former debts as well as the latter must be paid or discharged before the mortgagor will be permitted to redeem on his own application—for the condition being broken the estate of the mortgagee becomes absolute at law, and he must do equity before he can have equity—

1 Ven. 41. But if the mortgagee in the case supposed exercises
244. his will to foreclose, the mortgagor is not bound before it—

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demption to pay the other debts.

Eqca al. 600. It is a general principle in Chan. that a change of the relation between the parties, as to being Pltff. or Pow. 143. 511. Deft. is a change in equity.

For instance if the mortgagor's heir would redeem he must pay every debt due to the mortgagee by bond, as well as by ~~mortgage~~ simple contract if he would 1 Ven. 245 make the application him self, but the debt must 5 Pr. Wms. 775 be by bond, or of as high a nature as a bond debt, 1 Ves. 87. otherwise the heir is not liable — a simple contract will not bind real assets in the hands of the heir — ubi eadem ratio ibi idem jus how different if the mortgagor redeems.

In coincidence with the same 2. Ven. 177 rule, if a lease for years is mortgaged, and then a 1 P. Ch. 512. new debt contracted by the mortgagor on bond, the 3 Atk. 240. Exr. must pay both; indeed, Mr Gould supposes that he must pay other than bond debts for a lease being personal is certainly liable for debts on simple contracts.

But if there be several incumbrances upon an estate, if the first incumbrancer has a 2. Atk. 52. 3 Atk. 240. 84. bond debt, it will be postponed to all real incum- 2 Atk. 556. brances on the land whether by mortgage, judgment,

or Statute, for the land is a specific lien on the land, and the first incumbrancer has not the same equity against a ~~prior~~ prior incumbrancer, as against an heir at law who is liable to the bond in respect of assets.

1 Ch. 287.

Ch. 145. Since the Statute of frauds and devises, the devisee of the equity of redemption cannot redeem without paying off the debt on bond secured by a mortgage; because the statute makes such a devise void as against creditors, and then the devise stands in the same case the heir would have stood if no devise had been made.

Ch. 145, 6

Before the Statute however such a devisee would not have been liable to a bond creditor.

Further if the assignee of the mortgagee has a bond debt, he has the same equity against the mortgagor and his representatives as the mortgagee himself had and no other.

2 Dep. Ch. 247.

If the money due to the mortgagee on bond was prior to the mortgage, the rule is the same, as where it is subsequent to it.

Ch. 145.

2 Equity 611.

Where the mortgagor is [illegible] in a will or some [illegible] it remains, the land will [illegible] the debt [illegible] the land; if the [illegible] [illegible]

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3. Ath. 518. exceed it.—

The rule is the same when the mortgagor's representatives petition for a redemption—

The Courts do not attempt to alter the contract, but they impose terms on him who applies i.e. the mortgagor—

Pow. 146, 7. But this can never be done in an application of the mortgagee to foreclose, for it would alter the contract.

There are many cases in which the mortgagor and his representatives on a petition to redeem are bound to pay the debts not due on the mortgage as well as those that are.—

2. Ch. 131. Where the mortgagee has practised fraud upon a third person by the concealment of a debt due on bond, the mortgagee shall be permitted to redeem on payment of the principle money only.—

1 Ch. 41. And if part of an original mortgage be paid off and then a further sum be borrowed on a defective title, the last sum must be paid as well as the first on redemption by the mortgagor.—

Pe. 6. 89. But the purchaser of an equity of redemption for
511. a valuable consideration may redeem without pay-
2 Sha. 110. a ing the debt not secured by the ~~seconds~~ mortgage
Sers. 87.

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for he is not the debtor — He purchases the land
2 Ves. 662. incumbered, and the land in the hand of the
~~incumbrancer and the land~~ alienee cannot be charged
to a greater amount than the incumbrance itself.

Indeed the mortgagor's claim to redeem his mortgage, as well as those secured by mortgage, is good even against the mortgagee and his heirs. —

Length of possession by the mortgagee after forfeiture, is not of itself a absolute bar to the mortgagor's right of redemption, for mortgages are not within the Statute of limitations. —

3 Ath. 313. But other length of possession
3 Bacon 515. after ~~forfeiture~~ forfeiture is not absolutely considered as a bar to the
mortgagor's right of redemption, yet courts of equity have
3 Ph. 285. so far followed the Statute of limitations in Eng. as
to say that twenty years possession after forfeiture is
prima facie evidence of the mortgagor's having abandoned his right of redemption. Hard indeed it is, presumptive conclusive evidence, unless there are some impediments or disabilities, on the part of the mortgagor, which hindered him from redeeming. —

This equitable bar to the mortgagor's right, proceeds principally upon the presumption the mortgagor has abandoned his right; if this presumption can be

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removed or rebutted, the mortgagor's right will not be barred.

This presumption is rebutted or rather must be rebutted by proof of such circumstances as account for the mortgagor not redeeming, consistently with his not having abandoned his right — such as imprisonment, having been beyond sea &c. —

This presumption may also be rebutted by facts showing that the relation of the mortgagor & mortgagee has been recognized within twenty years in Eng. and fifteen in Con. — Indeed any act of the mortgagee by which he has recognized the mortgagor's right of redemption within 20 years will prevent a ~~right~~ bar of the redemption. —

Cowen ab. 596. If the mortgagee has within 20 years exhibited a bill to foreclose, it will preserve the equity, for it is a 5 Com. 565. recognition of the mortgagor's right within the time limited.

2 Mk. 533. If the mortgagee has received part payment, within 2 Cum. 418. the time limited, the mortgagor's right is not barred. Pow. 144.

The time allowed for redemption after the removal of any of these disabilities, is the same as that prescribed Pow. 150. in the Statute of limitations in all cases. — Ten years 161. 33 H. 2. 87. in Eng. and five in this State. —

But if any fraud has been practised upon the

mortgagor to prevent his redeeming, no length of time whatever will bar his right of redemption, for it is a maxim of
Shw. 151. equity as well as of law, that no length of time will be construed so as to suffer a man to take advantage of a fraud. —

As to these disabilities the rule is the same in equity as at Law — for if the Statute of limitations has begun to run the intervention of any of the legal disabilities does not prevent it. i.e. does not prevent a bar against the person before having a right to redeem. As for instance — A. gets into possession of B's land and remains in 5 years and then B. without taking any notice of it goes off to sea & is gone so long that the 20 years in Eng. & the 15 in Can. is passed over, tho his going to sea will not stop the Statute of limitations from running upon the land. this rule is not much adhered to in Can. as in many cases it might work great injustice. —

2 Ch. Ca. 418. These disabilities to have any operation
1 Eq. ca. ab. 315. or effect must exist at the time when the right accrues. i.e. when the equity of redemption commences,
3 Atk. 333. which is at the forfeiture by the breach of the condition.

When it is agreed between the parties, the mortgagor

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may take possession of the premises, & hold until it is satisfied, from the issues & profits of the land no length of
1 Eq. Ca. Ab. 418. time shall bar the mortgagor's right of redemption -
Pow. 156. even tho' it appears by the Plaintiffs own shewing that sixty years had elapsed -

In case of a mortgage in Wales or a Welsh mortgage, the possession of the mortgagee for any length of time is no bar. -

Pre Ch. 423 A Welsh mortgage is one by which money
6 Pet. 291. is ~~[illegible]~~ secured to be paid at a given day in a certain
2 Ven. 701. year, on the same day in any subsequent year - There then
2 Atk. 368. is no need of the interference of a Court of Chan. - for it may always be redeemed at law, for there is an everlasting subsisting right of redemption descendible
Pow. 157. to the heirs of the mortgagor, which cannot be forfeited at law like other mortgages - Therefore there can be no equity of redemption. -

2 Atk. 180. Again the length of the mortgagee's possession can in no case be a bar to a decree of redemption, if the mortgagee
Pow. 160. will submit to a redemption, but if the mortgagee does not avail himself of this right, he will be deemed to have waved it. -

Further if the mortgagor remains in possession no lapse of time will bar a redemption. - By an

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Eng. Stat. 4 & 5 Wm. & Mary, the mortgagor is deprived of his equity of redemption if he is guilty of fraud on the Mortgagee by concealing any prior incumbrance

2 Ven. 589.
1 Eqca ab. 320.

We have no such Statute in Can. but Mr. Gould supposes that our Courts of equity would adopt a similar rule – that is, if we can suppose a case in which a second mortgagee can be injured – Our records are considered as constructive notice of the situation of the lands, therefore the rule cannot well apply –

If any person who shall owe mortgage lands for a valuable consideration shall again mortgage the same lands, or any part thereof to any person, the same mortgage being in force, & shall not discover the same in writing to the second mortgagee, such mortgagor shall have no relief or equity of redemption against the second Mortgagee, but such second or third mortgagee may redeem any former one –

It is incumbent on the Mortgagor under the Stat. 4 & 5 Wm. & Mary, previous to a second mortgage of his lands to give the mortgagee notice in writing under his hand of all prior incumbrances –

A second mortgage of the same subject is a mortgage of the land itself & not of the equity of redemption, for this is all that preserves the right of the mortgagor after a second mortgage; for were it not so he could not redeem the first until he redeems the second – This seems rather a mere nominal distinction, but it is in it important –

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Of a devise of lands mortgaged, by the mortgagee

The interest of the mortgagee like that of the mortgagor
Sch. Rep 33. is devisable and the devisee as he stands in the place of the mortgagee, may have foreclosure.—

It was formerly the case, the ~~two~~ whole of the mortgagee's interest in a mortgage in fee, would not
Cro. Eli. 447, 449. 450 pass in a devise under the general words "all my Mortgages" but the devisee would have had an estate for life only, and the ~~reason~~ reason is that his interest may not be deemed a chattel interest.

But now the Mortgagee's interest being deemed a chattel interest only, the whole will certainly pass under the general words "all my mortgages &c

On the other hand the interest of the mortgagee will not regularly pass under the words, "lands, tenements & hereditaments" in a devise, as these words are used to denote real property therefore they will not regularly carry the interest of the mortgagee.—

But tho this is the general rule it is not universally true, for if the mortgagee had no other property at the time of making the devise which would answer the description of the words, such property as did answer the

description will pass under these general words.—

When therefore the mortgagee, that is the devisor has no other property answering the description, the mortgaged premises will pass.

A possession obtained by the devisee of the mortgagee, is not had against the mortgagee & his heirs but against the mortgagor & his heirs. The heir of the devisor is no party because he has no interest in the lands—

It is laid down that a devisee by the mortgagee of money due on a mortgage, does not carry the interest due on the debt at the time of the mortgagee's death, but the principal only.— Mr. Sugd however thinks this rule too broad, for he has no doubt but that the interest may pass in certain cases.—

The question has incidentally arisen whether the mortgagees interest will pass under a devise not attested under the Statute of frauds and prejudices & seems that it will, for this statute refers to real estate, the interest of the mortgagee is a mere chattel interest, and therefore not embraced by the Statute—

3 Mod. 260.
Cowper 79.
Co. Litt. 55. b.

2 Burr 978.

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Of the priorities of Incumbrances, and of taking of prior and subsequent Incumbrances or securities.—

Sug. 181. The general rule is, if there are several mortgages or other incumbrances upon the same estate priority takes place among the incumbrances according to the dates of the respective securities.— The first incumbrancer who has the legal estate shall be preferred to the second, and so on.—

1 Bro. Ch. ca. 66. 2 Ven. 524. Sugd. al. 142. 2 Ves. 477. Sug. 181. 2. 3.

Incumbrances in Eq. stand upon the same footing in order of time, as Statutes, judgments, & recognizances.—

In Eq. neither Statutes, judgments, recognizances, enumerated, for we have no Statute which intervenes but the Latin maxim governs "prior in tempore, potior est in jure.—

But this priority under some circumstances is forfeited or rather lost i.e. when prior incumbrances are postponed to subsequent ones. 2 Ves. 570. 1 Sho. 240.

1 Ch. 360. 2 Ch. 280. 1 Ch. 755. 1 Ven. 187.

This loss of priority may happen 1st when the prior incumbrancer has been guilty of any fraud or neglect of putting a subsequent incumbrancer.—

1st is the first class of cases. If the first mort-

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-gagee by fraud or artifice conceals his mortgage to induce another person to lend money upon the security of the same land, & this person does actually lend his money, the first mortgagee shall be postponed to the subsequent incumbrancer.—

1 Ven. 370. Barnard. 101. 2 Ath. 24.

2dly. So also if a first mortgagee be a witness to a mortgage deed made to a subsequent mortgagee of the same premises & shall not inform the second mortgagee, he shall be postponed to the latter & it is to be remarked that the law always presumes that the witness knows the contents of the instrument which he has attested — And this throws the onus probandi of not knowing the contents upon the first mortgagee. —

1 Ph. 393. 5 Ves. 6. 1 Bro. Ch. 957.

In all these cases the first mortgagee is deemed to be guilty of fraud —

But further it has been said that if the first mortgagee has been guilty of any neglect whereby any person is induced to advance money upon the security of the same land, the first mortgagee shall lose his priority, because he permits the mortgagor to retain in his hands the evidence of a complete title; for the mortgagee should have taken the title into his possession, & thus have prevented this

1 Ver. 360. 1 Ver. 136. 3 P. Wms. 88. 13 Ves. 755. 2 Ver. 399.

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danger.— The maxim of equity which applies here is "where one of two innocent purchasers have been guilty of neglect, & one of them must be a sufferer, the loss shall light on him, from whose omission the mischief arises—

Again: if one who is about to lend money upon a mortgage, request to know if he has a mortgage of it, and he denies that he has any, he loses his priority, provided he informs the first mortgagee on application that he is actually about to lend money on the same security to the mortgagor.— If he does not so inform him the first mortgagee will not lose his priority by such denial; for the first mortgagee is not bound to answer unless he knows the intention of the applicant.—

2 Ven. 554 & n. 564.

Even a prior incumbrancer may lose his incumbrance by the second incumbrancer's purchasing in the prior incumbrance to protect his own.—

Where a subsequent incumbrancer obtains the legal estate, he may make all the advantage of it which the law will admit of, and thereby protect his own title.— Here the equitable interests are equal, & it is a rule that where two ~~interests~~ equities are equal, that which has the law on its side shall prevail.—

But in order to entitle the subsequent incumbrancer to a priority, he must have given his credit to

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the mortgagor without knowledge of any intermediate incumbrance, for then he will have law & equity on his side.—

2 Ver. 574. But where a subsequent incum-
2 Vent. 339. brancer gave credit to the mortgagor knowing of
1 Ver. 178. the precedent incumbrances he will not be ad-
3 Vent. 337 mitted to tack on his security i.e. he shall gain
Ch. 226. no priority. Ver. 187, 8.—

To exclude the subsequent mortgagee from the privilege of tacking, he must have had notice of the intervening incumbrance at the time of lending his money or giving credit to the mortgagor; for such knowledge after the money lent will not exclude the tacking a priority.—

This privilege of tacking mortgages is called
2 Vern. 79. by Lord Hale, "caluta in naufragia."

A subsequent incumbrancer may tack on this
was his equity not only to the first mortgage but to
any other incumbrance or mortgage that carries
the legal state.

In all of the above cases the subsequent
1 Vern. 49. incumbrancer, gained a priority over all the inter-
mediate incumbrances until his own debt to-
gether with the interest on both are satisfied.—

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To the general rule that equitable interests have
2 Ver. 480. priority according to the dates of their respective securities, there are certain exceptions. — As where
2 Ven. 608. any one of the parties have more equity to claim the legal estate than the others, for he that hath more equity shall be preferred. It being a maxim in equity "that what ought to have been done, is always to be considered as done."—

But if the prior incumbrance which carries the title attaches on a part ~~and not on the~~ only of the subsequent
2 Vent. 338. mortgage, it will protect that part, and no more — And therefore if a man being seized of 60 acres of land mortgage 20 to A. and then the whole to B. and afterwards the whole to C. — Then if C purchases in the first incumbrance, that shall not protect more than 20 acres, but it shall so protect those 20 acres that B. shall never recover them until he pays all the money due on the first and last mortgage. — It will be understood that B. in this case ~~that~~ will have a right to redeem the 40 acres of the 60 if he pleases without redeeming the 20. but if he wishes to redeem the 20 he cannot do it without redeeming the 40 also. —

But if the prior incumbrance brought in, attaches

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upon other estates as well as that offered by the subsequent mortgage, the subsequent mortgagee shall hold all the estates comprised in the incumbrance bought in, until he is satisfied as well for his own debt, as for the money paid by him in purchasing in the first mortgage.—

1 Ch. 482. 1 Ch. 2 ... 3. Regcal. 323. Sow. 212.

If there are three mortgages or more of the same property, the first of which covers more than the two others the subsequent incumbrancer may by purchasing in the first which covers the two others, hold the whole until both debts are paid.—

A satisfied incumbrance or mortgage is one paid after the day of payment has expired.— This payment it seems does not revest the legal title, but the mortgagor has his remedy in equity only.—

In all cases a subsequent incumbrancer may lack in purchasing in the prior incumbrances.

1 Ch. 18. It is presumed however by Eq. that there may be cases so circumstanced as to prevent this lacking or gaining priority.—

2 Ch. 36. Cadell. 5 Ch. 318. Sow. 214.

A prior incumbrancer may always make use of his satisfied incumbrance at law except when there is a good legal defence to it. This rule however appears to be a great hardship & ought to discourage the

equity in it, for the right purchased in, is merely nominal and excludes by the supposition in this case, an actual, legal, & equitable interest.-

1 Eqca.d. 322. The rule goes further, it seems to be settled, that the subsequent incumbrancer by pur-
1 Van. 277 chasing in this, nominal satisfied estate, without
1 Ch.ca. 35. paying a valuable consideration, holds against intervening incumbrances - This is certainly extremely inequitable.

2 Ver. 159. And in pursuance of the last rule, Courts of Cha.
1 do. 52, 3 have gone so far as to say, that the naked possession of
Pow. 215. such incumbrancer, shall gain him priority, & protect his estate against all intermediate incumbrances. Sed quere.-

Pow. 215- But when the prior incumbrance thus purchas-
2 Ver. 204. 1 P.W. 240. ed in, is deficient in any of its legal requisities, it will give
2. Eqca.d. 592. no priority to such subsequent incumbrancer.-
7 Viner 54. As if a recognizance wanted in, hath not been enrolled in proper time, or in case of a judgment if it has not been docketed &c.-

1 P.W. 495. Indeed the subsequent incumbrancer can gain no priority except by purchasing in the legal es-
1 Ch.R. 173 tate, for there is no such thing as tacking an equity to any incumbrance, but that which carries the

legal estate only, with it.

2 P.W. 491. 21 Ver. 262. Ca. Ch. 494. 376. — No other incumbrancer than the mortgagee is allowed to tack. A judgment or Statute creditor in Eng. cannot gain a priority by purchasing in the legal estate, so as to tack his own equity — for he has only a general lien and no specific lien upon the land — He is not deemed therefore to have equal equity with an intermediate mortgage incumbrancer.

Eq. ca. ab. 325 2 Atk. 347.

The law of tacking is founded upon the general maxim that where equities are equal, that which is on the side of law shall prevail.

2 Ven. 361 1 Ver. 156. The purchase of the first mortgage — will give no priority to the purchasing subsequent incumbrancer, unless the first mortgage be forfeited at the time of purchasing — for before that time the estate is defeasible at Com. Law. by paying the money or fulfilling the condition, & is not a subject of equitable jurisdiction, for the court of equity has nothing to do with mortgages until the condition is forfeited.

Ver. 227. 2 P.W. 494. 2 Atk. 352. A prior incumbrancer having a legal estate may tack a subsequent sum advanced upon an a former security to his prior mortgage

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and thereby barred himself against mesne incumbrances — for as to this subsequent he stands in the place of
2 Ver. 663. 16 Ch. ca. 189. a subsequent mortgagee who has purchased in the prior mortgage i.e. the legal estate. — In case, Ld. C. supposes to give him this privilege of taking, he must have had no notice of any mesne incumbrance at the time of advancing this subsequent sum. — This Ld. Cowper supposes to be the equitable qualification, altho no such is laid down in the books.

Bro. 230. So also if there are two or more mortgagees, and the first make a subsequent loan to the mortgagor,
2 R. 494. after the subsequent mortgage, & takes a judgment
P. Ch. 226. for security, he may tack this judgment to his
2 Eqca. 594. original mortgage, to protect himself against
2 Ch. 352. the intermediate incumbrance. He hath here the
2 Ver. 662. 224. legal estate, & the judgment, which tho' it passes no interest in the land, operates as a lien thereon.

This rule with respect to notice has an explication; for it is a rule, that where the intervening incumbrance is defective, the subsequent incumbrancer may tack, and hold to the exclusion of the mean incumbrances, if he knows at the time of advancing the money of the intermediate incumbrances.

2 Bro. 644. So also if the mortgage is defective in legal re-

1 Eq. ca. 320. 2 Ver. 215. 232. cuisites, the last shall be good against the first incumbrancer, altho the subsequent mortgagee knew at the time of giving credit to the mortgagor of this first incumbrance. The reason is plain; the first mortgage being defective in form, does not convey the legal estate.—

But a defective mortgage will be enforced in a court of equity against creditors who have only a general, and not a special lien upon the land; for as they did not originally take the lands for their security, they will be postponed until such defective security shall be satisfied.—

2 Ver. 234. 1 Eq. ca. 321. 2 Ver. 504. 3 Ch. ca. 44. 3 Bac. 42. 1 Ver. 62.

If the mortgage deed contains the clause making the land a security for subsequent loans, such loans will have relation to, & be taken as a part of the original mortgage.—

2 Ver. 236. 285.

The rule holds if the first mortgagee had notice of the intervening incumbrances at the time of making subsequent loans. that is, if the second mortgagee at the time of giving credit, knew of this restrictive clause, for if he ~~knew~~ not had no notice at the time of making the second loan, it will not hold against the subsequent mortgagee

2 Ver. 236.

Hence under the preceding rules various

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the rule of priority, if notice is charged by one party it must
Ch 226. 2 Vent 361. be absolutely & positively denied by the other or he will
2 Ver 450. 3 Dr. 242. be deemed to confess that he had notice 2 Ch 73. Pow. 253.

If notice is denied by the subsequent incumbrancer,
1 Ver 256. 95. who has purchased in the legal estate, & the fact is
Ch. 19. attempted to be proved by the testimony of one witness
254. only, the bill will be dismissed - for this is oath against oath, & is not sufficient proof according to the rules of evidence in Chancery. -

2 Ver 450. It is a rule of the Court of Chan. when the
Pltff. charges not only notice in general, but ex-
Pow. 254. ho special facts, & circumstances, that they
must be denied as well as notice in general

But if there are circumstances corrobora-
1 Ver 97. ting the testimony of the witness advanced,
2 Ch. 19. 141. when the Deft. denies, an issue will be directed
Pow. 255. in a Court of law, whether the Defendant had
Ch. 52. notice or not, but if the circumstances are sat-
isfactory to the Chancellor, he will dispense
with such issue, & find the fact himself.

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Of Notice express and implied.

2 Ver. 156. Gardiner v. Ives 147.

Notice is of two kinds actual or ~~implied~~ express, and constructive or implied.

1st Actual Notice. One is said to have had actual Notice when he is party to a deed, or which shows the fact, or has notice regularly served upon him &c.

2 Ver. 156. 3 Atk. 204.

[illegible] considered as actual notice [illegible] lines and [illegible] at the time, to the contract or mortgage [illegible] B has a mortgage of the same land? This answer is will [illegible] actual notice.

1 Ver. 319. 2 Ven. 662. 2 Eq. cab. Abridg. Eq. 8.

2d Constructive Notice, is a conclusion of law that one has notice of the fact, tho there is no [illegible] of actual notice; as where one cannot make out a title but by a deed or which discloses a material fact, or such the person to whom notice should be given is necessary, or may be necessarily led to a knowledge of the fact. As where A. conveys to B. reserving a power of revocation. B conveys to C. C. is here deemed to have notice of the power of A. to revoke:-

1 Ch. 215.

So if [illegible] lands to A. subject to [illegible] of A. mortgages the land to B. B. is presumed to have notice

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that the land is charged with legacies, stating [illegible] is [illegible] of agreement, so if [illegible] devisee [illegible]

Pow. 266. So if a deed reciting a prior mortgage upon an estate is
2 Ver. 486. delivered among the muniments & papers to a purchaser, he is pre-
2 Vern 384 sumed to have notice of the prior charge, so where a mort-
gage is made by indenture, the mortgagor's duplicate is deliv-
Pow. 271. ered to a subsequent mortgagee, before he lends his money
this is deemed sufficient notice.—

The general rule, recited, admits of one exception.
Pow. 261. 265. In case of an assignment of a testator's property by an Ex:
1 Ver. 179. the assignee is not deemed to have notice of the contents of
3 Atk 236. the will in favor of creditors and legatees; otherwise
2 Ver. 148. 150. than this, would be dangerous, besides the purchaser
2 Vern. 444. cannot know the amount of debts &c and the assets.—

A recital of one deed stating, or necessarily implying that there is an incumbrance on the land by a prior deed, is deemed sufficient notice to a person possessing the deed.—

2 Atk. 54. It is laid down as a rule that whatever is suffi-
1 Ver. 387. cient to put the party charged with notice upon an en-
1 Atk. 490. 522. quirey is in equity deemed sufficient notice.—

Upon the same principle it would seem that notorious possession by a prior mortgagee would be a sufficient notice of the incumbrance to a subsequent mort-

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rule.

1122. ch. 69. 2 Ver. 77. 485. 2 Ver. 574. — Notice to one's agent or counsel, when a case is prepared, is constructive notice to the principal himself.

1122. 55. This rule holds also when one is agent for both parties, as is frequently the case in marriage settlements.

2 Ver. 69. Bohun ch. 244. — Suppose a person takes a term, without authority, and makes a mortgage or a lease, and the principal afterwards ratifies the act, or agrees to it, he makes the former his agent "ab initio".

Sug. 280. But notice of an act of bankruptcy, will not be presumed against a bankrupt mortgagee, to prevent him from availing himself of the right of tacking.

If also a subsequent mortgagee, may tack his equity to real estate notwithstanding an intermediate judgment obtained against the mortgagor in a court of law, altho' it is matter of record, for judgments obtained by intermediate incumbrancers are deemed to be unknown as to third persons, & cannot affect third persons unless they are proved to have had express notice thereof, before they lent their money.

Sug. 283. 284.

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A question has arisen in Can. whether a subsequent mortgagee can tack his equity to the legal estate by purchasing in the first mortgage or legal estate, over the intervening incumbrances whose deeds are recorded. On principle such records ought to be deemed as notice, for certainly their object is to give notice to third persons merely & not to the intermediate parties. But in Eng. the fact of registering intermediate incumbrances, has not been considered constructive notice.

Cow. 287.
1 Eq. ca. ab. 615.
2 do. 609.

But a subsequent mortgagee having notice of a prior mortgage not registered, cannot gain a priority by registering his own deed and purchasing in the legal estate. The Courts in assigning their reasons for the rule, consider the subsequent mortgagee as having that notice which the Statute was intended to require.

Cowp. 712.
1 Ver. 64.
2 Atk. 274.
3 do. 646.
Sha. 664.

A subsequent mortgage registered is preferred to a prior one, not registered, if the subsequent mortgagee had not actual notice. This is indubitably agreeable to principle; for the Stat. regularly gives priority to incumbrances according to the dates of their respective deeds.

1 Ver. 64
3 Atk 646.
2 Atk. 275.
2 Bro. Pa. 425.

But a purchaser for a valuable consideration shall hold against a prior voluntary conveyance at the time of taking his deed; for a convey

1 Eq. ca. ab. 384. 334.
Cowp. 280
711.

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are fraudulently made to cheat creditors & bona fide purchasers is ipso facto void and the making a voluntary conveyance always raises a presumption of fraud. – This rule holds as well to incumbrancers, as to common purchasers. –

It is a rule if one purchases of a prior incumbrancer without notice, and then sells to another who has no notice, the notice given to the grantor or vendor shall not affect the grantee. –

If J. S mortgays an estate to A. & then mortgages the same to B. who has notice at the time of purchasing, & then B. sells it to C. without notice, C who has no notice at the time of purchasing, is not affected by the notice which B. had. –

If a person purchases for a valuable consideration, with notice of a prior incumbrancer who had no notice the last purchaser is not affected thereby, for in so doing, he in no manner injures the prior incumbrancer, subjecting him to no more inconvenience than that he would have experienced under the grantor himself, he the last purchaser standing in the place of the grantor. –

This principle is shown extended and stop for

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When. If A. purchases with notice of a prior mortgage, & afterwards sells to B. who has no notice, & B. sells to C. who has notice, the last purchaser is in no degree affected thereby.—

1 Ath. 571.
P. Ch. 51.
Selb. ca. 187.

~~B. falls under the~~ The relation in which A. stands to B falls under the first rule, and that of B to C under the second.—

To whom the interest of the mortgage on a forfeited mortgage shall belong after his death.

Formerly it was much doubted whether the money due on the mortgage should on the death of the mortgagee go to his real or personal representatives.—

This distinction was taken, that if a bond was given conditioned to be paid to the mortgagee or his Exr. it went to his Exrs. But if there were no bond, or one was given conditioned payable to the mortgagee, his heirs Exrs or assigns, payment was to made to his heir.—

1 Eqca ab. 326

1 Vern 170.

But more recently the court of Chancery has considered the interest of the mortgagee as merely personal & consequently the money in all instances goes to the Exr. unless the mortgagee himself has manifested a contrary intention.

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the contrary intention may be manifested in a variety of ways. — Any act however which indicates an intention to convert this chattel interest into a realty will cause his interest to be considered & treated as ~~[illegible]~~ real. — As if he purchases the equity of redemption or obtains a foreclosure & takes possession &c.

2 Cont 348
Toad 467
1 Ch. ca 283

Another reason for this money going to the personal representatives is that the loan or debt for the security of which the mortgage ~~[illegible]~~ was taken comes from the personal estate of the mortgagee, & the payment of the debt ought therefore to accrue to the same fund. —

Cur 299
30.

If the money is made payable to the mortgagee his heirs or Exrs. the mortgagor may on the day of payment, pay to either of them at his election, for here he prevents the jurisdiction of equity by fulfilling his condition at law. —

Cur 299
Fur vas
50.

If he pay it to the Exr. the heir must convey the land, for he is a mere trustee, & the trust is satisfied. But in Equity as between the heir and Exr. the money belongs to the latter, and the heir if it is paid to him, is compellable in Chancery to pay it over to the Exr.

Cur 302.
2 Cont 348.
35.

If there are two or more Exrs. payment must be made

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Equa ab. 319. to either, and a discharge from the Ex.r to whom it is paid is a full and complete discharge.—

2 Ch ca 187. A bequest of a specific legacy to the Ex.r does not bar his right to the money, for he holds money as trustee in au-
2 Ven. 412. -ter dwr't—

Then there is no Ex.r appointed the money belongs
Equa ab. 328. to the Adm.r — the heir must convey to such Adm.r when
there are no debts due from the estate, for the claimants
1 Ven. 470. under the Stat. of distributions, have more right to it than
the heir.—

So where the mortgagor releases his equity of re-
demption to the heir of the mortgagee; the personal repre-
sentative of the mortgagee have still a right to the
mortgage interest, but not to the whole estate as Bow.
improperly expressesit.—

But where an of the mortgagee him-
1 Ven. 271. self considers it as real property, it will be so considered
after his death, and the money of the estate is redeemed
will go to the heir. As where the owner of the estate purchas-
ed it under an absolute deed.—

Also if the mortgagee devises his estate in mortgage
Sw. 969. as real estate, the heir of the devisee is not his Ex.r will
2 Ven. 581. be entitled to it after his death.—
Pr Ch 265. But the mortgagee's intention of considering it as

real estate, does not operate upon the mortgagor or any claimant under him, but merely upon the mortgagees representatives.—

3 P.W. 217. Again; if money secured by mortgage is ordered to be laid out in lands & settled in any certain manner, it is bound by the articles, & goes as the land would have gone if purchased with such money, for equity considers that as done which ought to be done.—

2 Ver. 258. 3 P.W. 258. or. 58. 1 Atk. 467. 1 Ver. 15. If two persons make a loan of different & distinct sums and take a joint mortgage for the security of both debts, they are not joint tenants but tenants in Common, & the jus accrescendi consequently does not take place.—

And such is the rule even if they foreclose the mortgagor.—

Of the interest of the mortgagor's wife in the premises.—

As the wife may bar her right of dower by joining her husband in a fine or common recovery, so in the same way she may incumber it with a mortgage.—

1 Cas. 294. Finch 277. Her right of dower is then postponed to the mortgagee; but her right of dower is paramount to that of the mort-

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gage when the mortgage is made by the husband alone.

A jointress of lands mortgaged by the husband
16 h. ca 271. may redeem & she & the representatives shall retain possession
1 Bro. 213. until they are repaid the whole of the principal
2 Bro. 228. & interest which she has paid for the redemption. This supposes a case in which she has not joined to incumber for in that case she must bear her proportion of the burden i.e. 1/3. This rule holds only (says Mr. Gould) when a jointure is made by the husband after the land is mortgaged i.e. the mortgage is prior to the jointure.—

This rule holds when the jointure is in an-
2 Vent. 343. tiels executory, & is not executed by a deed of settlement.
1 Vern. 191.
Pow. 317.
1 Equ. ca. 316. And if after such executory jointure the husband mortgage to one without notice she has only the right of redemption.—

If after mortgage she joins in a fine to a mortgage she must on redeeming pay her proportion, i.e. 1/3 & if she do not redeem during her own estate she must keep down the interest.—
3 Bro 229.

If the mortgagee gives further credit on the
16 h. ca. 119. same security to the mortgagor not having notice
Pow. 315 of an intermediate jointure he may take his last sum and hold for the whole against the jointress.

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But a jointure in mortgaged lands, settled after marriage, and merely voluntary i.e. without consideration is void against the subsequent mortgagee even if he had no notice. —

Cowth 280. 7 11 Pr Ch 237.

If a husband before marriage gives his wife a bond, conditioned to leave her a certain sum at his death, and she survives him, she may redeem his mortgages in the character of a creditor. —

2 Vern 683. 2 P.W. 364. 2 Co. 94.

If a husband takes a mortgage in the joint names of himself & wife, and he dies first, she is entitled to the whole of it, if there are assets to pay debts without. Quere, if the assets are insufficient to discharge the debts. —

2 Co. 99. —

On a mortgage in fee the mortgagor's wife is not entitled to dower in an equity of redemption; therefore as dower sets she can never redeem, for the husbands equity is considered in the nature of a pure trust of which there can be no dower. — Pr Ch. 137.

1 Atk 606. 3 P.W. 229. Jac. 138. 2 Atk. 525. 1 Bro Ch 526. Contra 2 P.W. 700

But a husband may have courtesy in his wife's mortgages. — And in Connect. it has been determined that a wife may have dower in the husbands equity. —

In Eng. the wife is entitled to dower in the reversion expectant on the determination of the estate or term mortgaged, for the determination

P. Ch. 133 2 Vern 403

of the term revest the estate at law.—

Of Mortgages by husband and wife of her freehold and his interest in the mortgage money due to her.

A husband by marriage obtains no other interest in his wifes estate of inheritance than a freehold during their
Pow. 337. joint lives, unless they have issue in which case he obtains an estate for his own life by the courtesy. He cannot therefore make a mortgage of her freehold for any longer period than that for which he holds. If therefore he should mortgage the estate for five hundred years, it would cease on his death.—

Co. Lit. 357. 4 Ven. 27. 2 P. W. 727. At Com. Law the rule is the same, even if the wife joins her husband in a deed, of her own inheritance, unless the joinder were in a fine or recovery.

Stat. Conv. 265. In Con. the husband & wife may by their joint act i.e. by deed, alien her inheritance and of course they may thereby mortgage it.—

Tabb. 46. 1 Ven. 61. 1 Roll. 371. 1 Eqca ab. 364. And in Eng. if the wife joins her husband in levying a fine either for the purpose of levying or mortgaging her inheritance, it will be binding upon her & her heirs, her coverture notwithstanding.—

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But acts of the wife dehors coverture amounting to a new grant or redexecution will give validity to a mortgage made by her husband & herself or by her self alone during coverture tho the mortgage be by deed.— and this is not on the ground of her deed's being voidable, for her contracts are absolutely void with one exception (where she makes a lease for years) but on the ground of its being a new execution or redelivery.—

2 Ver. 53.
6 Cowp. 201.
Cake. 54
2 Ch. Ca. 127.
2 Ver. 526.

If the wife joins in a fine to secure a mortgage, of her estate, and the mortgage is forfeited, the estate will be holden by the mortgagee not only for the original sum borrowed but if a further sum be borrowed it will also be holden for that.—

Pow. 342.

The principle on which the Courts have decided is, that the mortgagee has by the mortgage the legal ~~estate~~ title & in addition to that as much equity as the wife or heir has to be restored to the possession, & where the equity is equal the legal title shall prevail.—

But on the other hand if the wife's land is mortgaged to secure the husband's debts, his personal estate shall first be applied to the discharge thereof, tho she hath levied a fine, even in exclusion of the claims of his legatees; for the mortgage being originally the debt

Pow. 343.
1 Pd. 264.
2 Vern. 604.
689.

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of the husband, the wife consenting to charge her lands with it, she does not make it less so than it was before.—

1 Bran. 213. Pow. 346. From the foregoing it will follow, that if the wife joins in incumbering her jointure to secure her husbands debts she does not absolutely part with it, but will repossess it upon discharge of the incumbrance.—

Pow. 348. If the wife joins in incumbering her own estate to disincumber her husbands & he dies first, she 1 Eq. ca. ab. 68. will as to the heirs be considered in Chan. as standing 2 Vern. 581. in the place of the mortgagee and entitled to the benefit of his estate, for she is virtually considered as a purchaser of her husbands estate, tho' her estate is liable to the mortgagee.—

If a feme sole being a mortgagee marries & her Pow. 349. 350. husband upon the marriage makes a settlement of his own estate upon her, in consideration of her fortune, this 2 Atk. 444. settlement will be considered as a purchase of the mortgage.— If she dies first it will go to him, but if he dies she living it will go to his representatives and not survive to her.—

But this rule does not hold in case of a voluntary settlement Pow. 63 Pow. 350. after marriage, for there is no fraud the husband does not 1 Eq. ca. ab. 7. in this case become a purchaser & that accession of fortune and the ground which he went upon was that there was no

contract on the part of the wife, for after marriage she was incapable of contracting.

If a settlement be made upon the wife before marriage, but in consideration of part of her fortune only, it will do away the general presumption that it was in consideration of the whole, and in such case it is apprehended that what is not specially conveyed to the husband will survive to the wife.—

And when according to the above rules an actual settlement made by the husband would amount to a purchase of the wifes fortune; an executory agreement will amount to a purchase, even tho the wife should die before an actual settlement had taken place.— If in this case the husband had been guilty of no default or neglect the portion will go to the husband or his representatives

Pow. 351.

But it is to be observed that this executory agreement would be enforced against him in favor of the heirs in a court of Chan. Pre Ch. 312. 1 Eqa ab. 70.—

If a settlement made by the husband in consideration of the wifes fortune falls short, or does not amount to what was agreed upon, it will in no wise be considered as a purchase, but she will hold the whole against the husbands creditors.—

1 Vern. 68.
1 Eqa ab. 68.
Pow. 352.

Further where the wife is mortgagee the

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2 Ves. 352. husband is entitled to the mortgages as he is to her choses in ac-
Pre Ch. 312. tion if he reduces them into possession during coverture.
2 Ban. 501.
1 P. W. 458.

And an alienation or an assignment of the wife's mortgage by the husband (she being mortgagee) will
2 Ban. 401. be binding if made for a valuable consideration for this
170. act is considered as equivalent to reducing the mortgage
Pre Ch. 118. into possession. But if the alienation or assignment is merely voluntary, i.e. without consideration, the assignee has no higher claim to the estate of the wife than the husband or his heir could have had, had there been no ~~assignment~~ assignment made. —

If the husbands creditors get possession of the
1 P. W. 458
3 Ves. 197. wifes mortgage, so that she is obliged to apply to a court of Chancery for relief, such court will not interfere so as to take from them any legal advantage which they may have acquired. — As in case of an assignment by Commissioners of bankruptcy — They have the evidence
1 P. W. 458. of a legal title in themselves, of as an high an equity as she has, for the husband might have disposed of it to his creditors.

On the other hand if the wife herself or her trustees have possession of the title deed equity will not interfere in favor of his creditors when there is no remedy at law against her. —

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But if the husband will make some reasonable provision in her favor the court will interfere, & Mr. Gaud thinks that the bankrupt creditors have the same right.—

1. P.W. 382. 459. Id. 515.

But the hand of equity will not interfere against the wife in favor of the husbands assignees. it will in favor of a special assignee of the mortgage by the husband for a valuable consideration — It will not interfere in favor of creditors who have a general lien on the husbands property, but only in favor of those who have a special lien. —

2 Ver. 270.

A mere executory agreement by the husband to assign for a valuable consideration his wifes mortgages as a security for a debt with a delivery of the deeds will bind the mortgage pro tanto i.e. to the amount of the debt for which the assignment was made.

2 Atk. 207. 3 P.W. 364.

Out of what funds mortgages are to be redeemed

There are some general rules on this subject which are important, and which if thoroughly understood will greatly elucidate the particular cases which have been determined. —

It is a general rule in equi

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ty, that the fund which has been increased by contracting a debt, is in the first instance to be charged with the payment of such debt — Thus the mortgagor personal property having been benefitted by the debt, it is first to be applied in its reduction. —

3 Salk. 479. 9 Ath. c. 54. Pre. Ch. 261. 3 Pr. Wms. 358. 1 Eqca ab. 269.

If there are personal assets, the Exr. is compellable in Chan. to advance the redemption money for the benefit of the heir — If there are assets the heir does not take the estate cum onere — This proceeds on the above rule laid down —

This rule tho general is not universal for it may be qualified and altered by the intention of the mortgagor.

Further if the mortgagee should sue the heir of the mortgagor upon the bond (which in Eng. is usually given) the heir may in Chan. compel the ~~mortgagor~~ Exr. to advance the assets & satisfy the demand in suit.

Pre. Ch. 477. 1 Atk. 487.

The devisee of the mortgagor who is quasi an heir is entitled to the same privilege; he is not indeed Haeres natus but quoad hoc he is Haeres factus. —

If then the mortgagor bequeaths his personal estate among his ~~[illegible]~~ relations it must still

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according to the general rule be applied to the benefit of the heir — as the mortgagee's claim is a debt, & the claims of creditors are prior to those of legatees, they being mere volunteers.—

1 Ver 57.

But if the testator directs otherwise the preceding rules do not hold, & the heir or devisee takes the land cum onere.—

So is the principle of the prior liability of personal property pursued, that even if the real estate is charged generally with the payment of debts, such charge renders it liable only in case of a deficiency of assets.—

1 Ver. 57.
2 Vern 718.
Pub 451.

If however the real estate be so charged as to make it manifest that the mortgagor's intention was that it should be applied in the first instance, it will be so applied. Eg. Land devised to A. to be sold for the payment of debts.

To apply this rule — The mortgagor devises his real estate to J.S. and his personal to J.N. and dies leaving debts unpaid; now all the personal estate is first to be applied to the redemption of the mortgage — Aliter if a contrary intention is clearly manifested.—

In Connecticut these rules are not so important as in Eng. for here the real property in general de-

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sends to the same persons who enjoy the personal and here all the property of the testator or intestate is liable for all his debts whether due on specialty or simple contract — It is understood however that personal is first liable.—

This general rule is never suffered to operate in favor of the heir, to the prejudice of any creditor, tho' his debt is by simple contract — nor even against general legatees.

The rule last laid down seems to clash with one laid down before, respecting the liability of personal property descended among the various relations of the testator — Indeed it is plainly contradictory — or it, this "explanation" is not taken notice of, by any lawwriter — It might be reconciled on the hypothesis the ~~the~~ bequest referred to, among the ~~various~~ relations of the testator was entirely void on the ground of uncertainty, and of course as if there was no bequest at all — But Mr. Gould does not positively lay it down that this is the proper explanation, because nothing in the reported case expressly warrants it; ~~—~~ and if it was void on the ground of uncertainty, the report of the case would probably have noticed it particularly.—

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Mr Gould observes that Mr Powel uses the word general in contradistinction to residuary legatees - and as distin-
Pow 377. 385. guished from specific legatees

To return to the main subject - If the personal fund is exhausted by specialty creditors -
Pow ante Tolb. 53 the simple contract creditors and general lega-
2 Ch. 4.5 tees may come upon the real estate pro tanto, for
1 P. W. 693 so much as the specialty creditors have taken from the personal fund - So that in equity simple contract & general legatees are preferred to the heir. -

This rule holds also in favor of simple contract creditors & legatees against the Mortgagors de-
Pow 378. visee; unless the devise is specific, in which case
Tolb. 53. 1 P. W. 678. it does not hold as to legatees but merely as to creditors
384. 403. by simple contract, for a specific devisee is post-poned to a ~~specific devisee~~ simple contract creditor, but not to a general legatee. -

When the descent is broken, and the heir of the
Salk. 418. mortgagor is made to take by purchase under a devise
1 P. W. 201. 681. he stands in the same situation as a common devisee, specific or general as the case may be. -

By the descents being broken is meant such a disposition of the estate, that the heir cannot take it as heir, for if the estate be so disposed that the heir

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might take it as heir, he must take it as heir, for he must be under his better title. — The case of a descent's being broken is when a tenant in fee in Eng. devises to his eldest son (who is heir) in tail. —

1 Eq. ca. 298. But notwithstanding the general rule, the heir of the mortgagor is not entitled to the aid of such of his ancestors
1 P. W. 127. personal property as is specifically ~~devised~~ bequeathed; & even money if it be so situated that it can be identified may be specifically bequeathed. —

1 P. W. 539. To render a bequest of personal property specific
2 Ver. 422. it must be clearly, certainly, & exactly identified or defined. —

In pursuance of the general principle, it is a
2 P. W. 386.
1 Br. Ch. Cases tho' the mortgagor devises his estate to one, "with
2 Ves. 461. the incumbrances thereon" yet the personal fund is, under the preceding qualifications) liable to disincumber the real estate bequeathed unless there are other words which clearly manifest an intention that the devisee shall take the estate ~~cum onere~~. — The words "with the incumbrances thereon" being descriptive of the particular estate bequeathed and not ~~restrictive~~ restrictive of the interest devised. —

Pow. 393. And if it clearly appears from the instrument of devise that it was the intention of the devisor that

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his devisee should hold the estate disencumbered even the heir must pay the incumbrances out of the
2 Atk. 424. real property, after the personal estate is exhausted.—

If the mortgagor sells his equity of redemption, the
10 Pow. 712. heir of the assignee, or purchaser has no claim upon his
1 Brch. 401 (the purchasers) fund to disencumber it, for the personal fund of the purchaser has not been benefited, nay it has been diminished and the real estate enlarged.—

The rule is the same as to the devisee of such purchaser.— So also if the money due on mortgage is not the debt of the owner of the equity of redemption, the estate mortgaged shall itself on the death of the owner bear the burden; and the heir or devisee of the owner shall not have the aid of his personal fund, but if he will have the land shall
1 Brch. ca. 58. 454. disencumber it himself.— In this case it is evident that the assets of the owner of the equity have
10 P.W. 347. not been benefited and of course they are not liable.—

Of the payment of interest of money due on mortgage

In Eng. the legal rate of interest is fixed by Stat. 4 Ann

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Pas. 421. St. Con. 431. at 5 per cent per annum. In Chan. it is 6 per cent. —

2 Mod. 307. Doug. 223. 4 Burn 2253. 2 Pr. 241. It is a general rule in all contracts, mortgages as well as others, that the receiving more than lawful interest makes the contract void. The receiving more incurs the penalties of the Statute. —

But tho. the reserving more makes the contract void it does not of itself incur the penalty — nor does the receiving more, of course render the contract void. —

L. Hardwicke has said that if a mortgage be made for 5 per cent and the mortgagee receives 6 per cent the mortgage is void. — In this he must intend the reception of more in pursuance of ~~the~~ a private

3 Atk. 154. original agreement between the parties or a receiving ~~of the time~~ of the loan, which is a reservation. —

The same chancellor has also holden that a deed given

3 Atk. 727. 1 Ves. 428. in Eng. mortgaging an estate in the west indies (where 8 per cent is allowed) is usurious if more than 5 per cent is ~~allowed~~ reserved — Here he must allude to cases where the payment was to be made in Eng. —

Cl. 160. Barnard 481. 3 Atk. 520. 3 Bl. 432. In Chan. an arbitrary distinction has been adopted between an agreement to pay 4 per cent interest with a clause of enlargement to 5 if the mortgagor does not make punctual payment, and an agreement that 5 per cent shall be paid, with a

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clause of reduction to 4 in the event of punctual payment. The latter agreement is enforced in Eq. the former is not, for says the Court it is in the nature of a penalty — This distinction says Mr. Gould is frivolous, and without a real difference and subject to perpetual evasion. —

2 Ves. 422.

It is agreed that the covenant to pay the additional one per cent is good in equity and it is not expressed to be necessary that the covenant be in a separate deed from the mortgage. —

2 Ves. 161.

2 Vern. 134.

An agreement to raise the interest from one sum to another (not exceeding lawful interest) in case of non payment is good in Chan. if an indulgence be given by the mortgagee to the mortgagor and such indulgence is the consideration to the contract; for in this case the agreement ~~consideration~~ is considered as a liquidated satisfaction for sum forbearance and not as a penalty. —

1 P. W. 652.
3 Bro. Par. Ca. 68.

Compound interest is not regularly allowed either in Chan. or at Law. P. Ch. 116. 2 Atk. 331. 1 P. W. 652.

But if the mortgagee assigns his interest with the concurrence of the mortgagor all the money paid by the assignee (including interest as well as principal) shall be accounted principal and draw in-

1 Vern. 169.
2 Atk. 135.
3 Atk. 271.
1 Vern. 168.

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terest.— This is in the nature of a contract between the mortgagor & assignee that the latter shall pay the debt of the former—

But if such assignment be made without the assignment commence of the mortgagor, the assignee has no claim for more interest than the mortgagee had, for this is not such a contract between the mortgagor and assignee as in the last case

The assignee will not draw his compound interest unless the assignment be bona fide and the money actually paid, for a mere collateral assignment to obtain compound interest is of no avail.

1 Equ. ab. 329.

When on the assignment by the mortgagee an account is taken between the assignee & mortgagee of the money due from the mortgagor, this account is not binding upon the mortgagor.—

1 Dev. 168.

It was even holden that the mortgagee should have compound interest when the estate was forfeited. This is now exploded — The report of a master in Chan. computing interest on the suit pending between the parties, converts that interest into principal from the time the report is confirmed by the Chan. for such report so confirmed is in the nature of a judgment at Law.—

1 Dev. 135.
2 Ch. 116.
2 Pow. 429.
1 P. W. 478.
4 Ves. 376.
3 Ch. 500.

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1 Ves. 392 But a master's report when made against an infant
3 Ch. 25. does not in all cases convert the interest into principal.
1 Bro. ca. 56 It never does when the infant is defendant in a suit
1 Ch. 446. for in that case the infant is never guilty of any neglect in not having previously satisfied the claim of the mortgagee according to the master's report.—

If however the infant is Plff. in Chan. the amount made up against him by the master does turn the interest into principal, for in that case the Deft. is driven into Court by the infant, the decree passes as to him
1 Eq. ca. Ab. 287. in invitum & he may take what advantage he is able of the situation in which he is placed by the Plff.

Again if an infant intitled to the equity of redemption agrees to pay compound interest for the purpose of procuring some substantial benefit, and
1 P. W. 652. does actually procure it he shall be bound by such agreement.—

2 Ath. 449 A mere signing or acknowledgment by the mortgagor that so much is due on interest, does not convert
2 Ath. 331. that interest into principal; for interest is not to be computed on interest except after a report of a master confirmed.—

And express agreement at the time of making the mortgage to pay compound interest is not binding;

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for it is treated as prima facie, oppressive. But after interest has actually accrued such agreement would be good

A tenant for life of the equity of redemption is compellable by the remainder-man or reversioner to keep down the interest during his own possession; Indeed the remainder-man may indirectly compel him to redeem by purchasing in the incumbrance himself, and then if the tenant will not redeem he must abandon the possession.—

P. Ow. 442
2 Eq. ca. 596.

In redeeming the tenant must pay one third of the original debt— the remainder-man must pay the remaining 2/3.

1 Ver. 477.
S. P. W. 285.

But the tenant in lieu of the equity of redemption tho in possession is not at all compellable to keep down the interest during his own possession neither by the reversioner remainder-man or his own representatives; for he has all those in expectancy, in his power and may forever conclude them by levying a fine or suffering a common recovery. Indeed his estate may by possibility last forever & certainly must endure while he has heirs of his body.—

Still if such tenant in tail be an infant, his guardian must keep down the interest during his minority; for the infant while such cannot bar the remainders; unless it be under the kings privy seal which will

2 Vch. 427.
Vch. 567.
1 Ver. 477.
486.

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never be used for such a purpose.—

If however the tenant in tail in fact does keep down the
1 Bro Ch. 218. interest, the remainderman or reversioner shall have the
1 Ver. 477 benefit of it. The reason of this is that there can be no proportion established between the value of a tenancy in tail and an absolute fee.—

If the first mortgagee takes possession and allows the mortgagor to ~~have~~ take the profits, without applying them to the payment of the interest, still in favor of a second mortgagee, the profits thus taken shall be applied to the payment of the interest, on the debt due the first mortgagee.—

1 Ven 150. When a bond is given to the mortgagee, the hold-
Salk. 158.
Prob. 209. er of the bond has a right to receive the whole debt, principal & interest, and the giving up the bond extinguish-
Pow. 453 es the debt. But the holder of the mortgage deed has no right to receive more than the interest, & his giving up the deed will not extinguish the debt, but the mortgagor is still liable for it to the holder of the bond. Indeed it is difficult to assign the reason why the mere holder of the mortgage deed, should be entitled to receive the interest, but it probably arises from the fact, that he has no power to obtain the possession of the premises.—

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A tender of the money by the mortgagor after the day of payment has elapsed, is of no avail at Law. But in equity if after forfeiture the mortgagor makes a tender to the mortgagee, who refuses to accept it, & if the mortgagor has given notice of his intention 6 months previous to the time of making the tender, the mortgagee loses his right to interest from the time the tender is made.

Such tender will also bar the right to recover interest of the devisee of the mortgagee, & probably also of his common assignee.

But in this case the mortgagor must make oath
19 Ves. 378. that he has retained the money, from the time of making the tender, ready to be paid to the mortgagee, & that in this interval he has derived no advantage from the money. This is in analogy to the rule of law respecting tender. —*

But the tender of a bank bill has been decided
1 Eq. ca. 316. to be sufficient, when the mortgagee had no objection
1 Ver. 339. to receiving it, on the ground of its not being a legal tender, & the mortgagor offered to exchange it if the mortgagee wished. This decision is questioned by Powel.

*It is a general rule that the tender thus made must
1 Ves. 372. 678. be strictly legal, or it will not bar the mortgagee in
3 Meth. 90. of interest.

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The debt due being a sum in gross, must regularly be tendered to the person of the mortgagee. The rule contemplates cases in which there is no place appointed at which the payment is to be made.

Co Lit 211. 210. 212. 2 Eq ca ab 612.

On the other hand if place and time are appointed, the mortgagor cannot make a tender at any other place; but a tender at the time and place is good, even if the mortgagee is not present.

2 P. Wms 378.

In equity if no place is appointed, & the mortgagor give notice when he will make payment, a tender at that place is good, if the appointment be a reasonable one & no objection be made to it at the time of giving notice.

16 L ca 29.

And it has in one place been decided that when no place is appointed, a tender at the house of the mortgagee is sufficient. This indeed was a case where the mortgagee kept out of the way, to avoid a tender from the mortgagor.

2 Eq ca ab 603. 3 Ath. 90.

Yet if the mortgagee has doubts as to any legal question arising from tender he shall be allowed a reasonable time to satisfy himself by counsel.

So also where a tender is made by a person claiming the equity of redemption he shall be allowed

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time to investigate the fact whether such claimant is the real owner of the equity.—

Powel says generally that interest on a mortgage (reserved) may be altered by a parol agreement subsequent.— But the case which he quotes does not support the position; that was merely a case of rebutting an equity, which may always be done by parol.—

If however the mortgagor had been Plff. Mr Gould says the rule would undoubtedly be otherwise.—

Bro Par ca. 580

The method of accounting.—

A mortgage being a pledge & not an alienation of the land, the mortgagee has no right to the profits until he takes possession.— Of course the mortgagor remaining in possession is not bound to account with the mortgagee for the profits; & an additional reason is that the debt due on mortgage draws interest.—

2 Atk. 107. Dang. 2 68

But the mortgagee must account for profits received during his possession i.e. they are to be applied first to the payment of the interest, & secondly to the reduction of the debt due from the mortgagor.

Ver. 476. 2 Atk. 534.

The mortgage in this case is in the nature of a

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bailiff to the mortgagor.—

If the mortgagee manages the estate himself, has no allowance for his care & trouble — And all that

3 Ves. 466. is meant by this is, that as bailiff he is to have no compensation for his pains; for he is certainly entitled to the clear annual value of the rents & profits subducting the labor and expense employed in producing them.—

Even tho' the mortgage contract with the mortgagee to allow him ~~interest~~ a compensation as bailiff Such agreement will not be enforced in Chancery.—

But it is laid down that if the mortgagee employs a bailiff he shall be allowed for the compensation made to sub bailiff — In Cons. this would not apply tho' in the southern States it might.— Why

1 Vern 316. 5 Ath. 518. 2 Ath. 120.

If a mortgagee in possession assign his mortgage to a person insolvent, he shall be liable for the profits which accrue after, as well as those which accrue before the assignment.—

1 Eq. ca. ab. 328. 3 Bro. 658. 2 Ch. ca. 3.

The mortgagee is to account with the mortgagor for those profits only which he has actually received, unless it appears that he might have received more but for some fraud or wilful neglect or default in himself.—

1 Ver. 45. 476. 1 Eq. ca. ab. 328.

But if the mortgagee having taken possession

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keeps other incumbrancers out of possession, he will
1 Ver. 270. be charged in favor of those other incumbrancers with
1 Ch. 30.
Pow. 468. all the profits he might have made. — Pow. 469.

It is to be understood that he is not bound unless he has notice of the subsequent incumbrances.

If the mortgagee out of possession permits the
1 Ver. 267. mortgagor to make use of his (the mortgagee's) legal
3 Bac. 658. title to keep other incumbrancers out of possession, he will in their favor be charged with the profits of which they might have had possession without his interference. This is called "fencing" & is a leaving the legal title in the mortgagor, by which he is enabled to fence his interest from the attacks of subsequent incumbrancers.

But if the incumbrances subsequent were volunta-
1 B. R. 762 ry on the part of the mortgagor i.e. by his own act, &
1 Ver. 267. not by operation of law, he cannot fence against such subsequent incumbrances.

After the mortgagee has assigned his interest a bill
1 Eq. ca. 594. brought for redemption against the assignee must join the ~~assignee~~ mortgagee as a party, for he must account for the profits which he himself has received.

If there are several mortgagees the amount sta-
1 Eq. ca. 12. ted between the mortgagor & the first mortgagee will
3 Bac. 657. be conclusive on the rest unless there be some fraud pro-

ved. — This contemplates merely the mortgagor & the first mortgagee, & not the account between the mortgagor & any subsequent mortgagee. —

1 Ch ca. 68. Pow. 472. But an account made up between the mortgagee & his assignee of the debt due from the mortgagor to the mortgagee will not conclude the mortgagor. —

1 Ch ca 102. After a great lapse of time, & several assignments the last assignee is not bound to account for the profits before his own time, & they shall be set-off against the interest that had previously accrued. Pow. 472.

2 Ver. 536. If the mortgagor after having endeavored to defeat the title of the mortgagee at law, exhibit a bill to redeem, the expenditures of the mortgagee in defending his title shall be allowed in accounting. —

2 Atk. 534. There are two methods of accounting. 1st By annual rests — These are an application of the surplus of the annual rents & profits over the interest, to redeem the principal: These are never made except when the profits considerably exceed the interest, & when allowed it is very advantageous to the mortgagor operating in a manner exactly the reverse of compound interest. —

2. By bringing all the profits into one aggregate sum & all the interest into another, & substracting the less from the greater. —

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Of Foreclosure.

As Chan. after forfeiture will decree a redemption for the benefit of the mortgagor, so also it will decree a Foreclosure in favor of the mortgagee, for the great object is to distribute justice in equal proportion to each party.—

2 Inst. 198. A decree of Foreclosure, is a decree that if the mortgagor does not pay the debt within a time limited by the Court, he shall be forever barred of his equity of redemption.— This decree is irrevocable except under special circumstances: It is not peremptory but conditional.—

Where a reversion is mortgaged the usual practice is not to decree a foreclosure but a sale of the premises.— This rule is in favor of the mortgagee and perfectly equitable for the reversion may fall in at a very distant period, & be of no great advantage to the mortgagee, unless it be sold.— Besides it is commonly more valuable to the owner of the estate than to any other person.—

Pow. 477.

1 Brock. 368.
2 Vent. 365.
1 Ba. 252.

If there are several mortgagees [illegible] as parties to the bill.—

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A foreclosure will never be decreed till after forfeiture. — It is said in the books, that on a bill for foreclosure the title of the mortgagee cannot be investigated but must be settled at law. This is very incorrectly expressed, for on such application the only question the applicant has the interest title to the interest of a mortgage may be investigated — The meaning of it is, that on a bill brought to foreclose Chancery will not aid the legal title of the mortgagee — The bill is brought for the purpose of barring the equity of redemption, & for that purpose only, & on this bill Chancery can do no more than to order a foreclosure, or deny a decree for that purpose. —

10 Ves. 476.

2 Ch. ca. 244.

A mortgagee may pursue all his remedies at the same time, & the pendency of one is not pleadable in bar or abatement to the others. —

2 Atk. 344.

In Com. after judgment is obtained on the bond or personal security of the mortgagor, the mortgagee may levy his execution upon the equity of redemption & have it appraised to him — Not so in Eng. for there the equity of redemption is not legal assets. —

Under special circumstances Chan. will grant an injunction against an action of ejectment brought by the mortgagee. —

2 Atk. 344.

Chancery may refuse a decree in a foreclosure, where

2 Pan. 271.

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injustice would be done evidently be the consequence of
Eath. 680. suffering it.—

If upon reference to a master, a mortgagor does not redeem within the time appointed when he himself has
2 Eath. 267. made an application to redeem; and afterwards on the application of the mortgagee the court on that ground dismiss the bill, such dismissal is equivalent to a decree for foreclosure.—

If the mortgagee's heir brings a bill to foreclose it will be cause of demurrer that the personal representative of the mortgagee is not made a party to the bill, for he is entitled to the money.—

2 Pow. 479. So without any demurrer if it appears upon the hearing that the personal representative is not made a party, the heir cannot proceed.—

But unless the mortgage be of a chattel interest the personal representative of the mortgagor, need
3 P. W. 333. not be made a party to the bill for redemption; he has no interest in the equity of redemption of a freehold estate.—

But the heir of a mortgagee has obtained a foreclosure it will bind the mortgagor, tho' the personal representatives were not a party, & the heir may redeem the land on paying the Ex.r or Adm.r the debt.
2 Ver. 66.
1 Ver. 567.

Mortgages.—

If the heir does not pay the debt to the personal representative, he may be compelled to convey the land to him; for the principal i.e. the debt due on the mortgage goes to the personal representative of the mortgagee, & the incident, that is the mortgage or security to the heir.—

2 Vern. 67. 367. 197. 2 Equit. 608.

In a decree for foreclosure the time allowed for the mortgagor to redeem is computed by Calendar month.

A decree to foreclose a tenant in tail, is binding upon his issue in tail & all in expectancy.

But if there be tenant ~~in tail~~ for life of the equity of redemption with remainder over, the remainder man, is not bound unless he be made a party to the bill.— The reason of this distinction is probably, that the tenant in tail has all those in expectancy completely in his power, which the tenant for life has not—

Pow. 483. 2 Ath. 101. 1 Ch. ca 217.

If there are several incumbrancers, who are not made parties to the bill for foreclosure, still the first mortgagee may foreclose such as are made parties to the bill.— But those not made parties to the bill are not foreclosed & may afterwards redeem.—

1 Ven 518. 185. 663.

When all the interest of the mortgagor is devised away the devisee may bring a bill to redeem

1 Eq. ca 318.

without making the heir of the mortgagor a party, for the latter has no interest in the mortgage.—

Pel. 185. 3 Bro. 148. 2 Ver. 342. 392. 479. A foreclosure may be decreed against an infant, but he has a day given him in court, after he attains at full age, to shew cause against the decree.— This day in Court as it is termed consists of 6 months after he shall have arrived at full age, & process to appear & shew cause shall have been served upon him.—

2 Ver. 23. Such a decree then is not in the usual form, for it contains a clause allowing the infant his day in Court.

2 P. W. 401. 1 do. 504. If within 6 months after having arrived at full age and having process served upon him, he does not shew cause against the decree it is binding upon him, but

2 Atk. 532. if he does shew cause, he may on such shewing, put in a new answer, & make a new defence.—

Bro. 489. In this case however the infant is not allowed to go into the account anew or of course to redeem on pay-

3 P. W. 352. ment of the money— This privilege extends no further than to enable him to shew that the decree was erroneous or unjust & to enable him to take advantage of that which if known at the time of making the decree would have prevented its being made—

1 Ver. 295. 2 Ver. 429 Indeed it is said that the proper remedy of the mortgagee when an infant is aware of the equity of redemption

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P.C.L. 184. is to have a sale & not a foreclosure of the lands, decreed.
3 P.W. 504. This binds the infant absolutely & is perfectly equitable for the surplus after payment of the debt belongs to the infant.–

If a feme sole, or her ancestor mortgages lands &
3 P.W. 352. the equity of redemption vests in her after coverture
238. a decree obtained against her for foreclosure is pe-
2 P.W. 450. remptory, & of course she has no day in court to shew
3 Atk. 712. cause against it – for her incapacity is a voluntary
1 Ver. 305. and not necessary one, & she has given her authority to her husband; if it appears however that any injustice has been done her, she may avoid the decree after coverture.–

If the mortgagee has been guilty of any fraud or
15 Viner. 476. unfairness in obtaining a foreclosure, the Court will open the foreclosure which is a revival of the equity of redemption.– 9 Mod. 153. 1 Eq. ca. ab. 606. 609.

Thus if the mortgagee obtains a foreclosure after a judgment
2 Vern. 601. creditor has given him notice of his demand & tendered
Pow. 492. him the money due on the mortgage the court will open the foreclosure – If however no notice is given, the foreclosure will not be opened – Ex de hoc –

When a foreclosure is opened in favor of a subsequent
2 Vern. 185. incumbrancer, the first mortgagee is allowed all his

expenses in obtaining it. — This rule thus laid down without qualification, seems unreasonable when the first mortgagee knew of the subsequent incumbrance.

Under special circumstances the time limited to the mortgagor for payment may be enlarged — As where the mortgagor without any default or wilful neglect must be greatly a sufferer by a foreclosure —

Bunnadis 221.

1 Eq. ca. ab. 605.

Indeed one foreclosure has been ~~opened~~ enlarged several successive times, if even when the mortgagor had entered into a rule not to apply again. —

1 Ver. 406.

2 Ver. 423.

10 P.W. 291.

A foreclosure is never opened in favor of a mere volunteer, that is, the one who has the equity of redemption without having paid any good or valuable consideration — As a devisee of the mortgagor —

2 Ban. 239.

1 Ban. 148.

Salk. 276.

If the first mortgagee obtains a decree against all the parties concerned, & afterwards devises the land to the mortgagor the foreclosure is ipso facto opened. —

The reason of this rule obviously is that the interest of the mortgagor in the lands is revested; & the mortgagor's due to the subsequent mortgagee is in the nature of an equitable estoppel. —

Mortgages.–

So also if the mortgagee having obtained a foreclosure,
1 Eq. ca. abr. 317. sues on his counter security, or his bond or note such suit
is a waver of the foreclosure – In Con. a foreclosure
with possession taken is a satisfaction of the debt. This
1 Root. 202. however is a decision not conformable to principle. –

Regularly a foreclosure is not to be opened when
2 Eq. ca. 177 599. the mortgagor has acquiesced for several years in the pos-
1 Bro. par. ca 414. session of the mortgagee under the foreclosure. – 2 Pb. 111.

In Eng. it is the practice when the mortgagor does
not pay within the time limited in the decree, to make
it absolute by a further order. – In Con. it becomes absolute
of itself. –

In Eng. a mortgagee may obtain a foreclosure how-
Pow. 502. ever small his debt compared with the estate. – In
Con. the debt must amount nearly to the value of
the estate, or no decree will be granted – Hence one
principal ground of foreclosure does not exist in Con. –

In Con. a foreclosure is seldom opend. Mr. Reeve
recollects only one instance, & that where the mortgagor
on his way to pay the mortgagee ~~paid sicard~~ within the
time limited fell sick upon the road. –

Of Estates in Joint-tenancy Coparcenary and common.—

Where an estate is holden by an individual only, it is termed an estate in severalty, in contradistinction to an estate held by a plurality of persons—

There are three kinds of joint-estates of which we propose to treat in their order— And

I. Of an estate holden in Joint-tenancy— This species of estate never arises by mere out of law, as by descent, but always by purchase.— It is distinguishable from other joint-estates by this criterion.— An estate given to more than one grantee, is of course a joint ~~estate~~ tenancy, unless the deed contains words evincive of the intention of the parties that it should be an estate in Coparcenary, or Common.

It is observable that in the state of N. York this rule is altered by Statute, there every estate holden jointly, is construed to be an estate in Common, unless explained to be in joint-tenancy or coparcenary—

The properties of an estate in Joint-tenancy are derived from its unities which are four— Unity of Interest of Title, of Time, and of Possession

Co. Lit. 188.

2 Bl. 181.

Joint-tenancy.

1st. By unity of interest is meant that it be one and the same quantity in all the grantees.

2. By unity of title is intended that the estate must be
2 Co. 181. created by one & the same act of the parties in all the grantees.
3rd. By unity of time, that it must vest at one and the same ~~time~~ period in all the grantees.

4th. By unity of possession, is meant that each owner shall
Co. Lit. 185. have possession of the whole estate, as well as every part & parcel thereof, being seized according to the ancient norman phrase "per my & per tout," by the moiety, and by all. Each must have an undivided moiety of the whole, & not the whole of an undivided moiety.

From these unities result many consequences & incidents to the state. Rent reserved on a lease to be paid
Co. Lit. 213a. 192b. to one joint tenant shall enure to the benefit of all. So a surrender, a livery of seisin made to one, & an entry made by one, shall enure to all. Indeed any act respect the joint estate, the act of one is the act of all.

Thus also by the English law in all actions relating to a joint estate, neither joint tenant can sue or
Co. Lit. 180b. be sued without joining the other. Not so in Con. for here a custom has grown up, which has been sanctioned by the bar, that one alone may sue a stranger. This arose, on the ground of inconvenience of compelling all to

Joint tenancy.

fine, when the owners might be separated from each other at a great distance in this widely extended Country.—

One Joint-tenant cannot sue another in Trespass for
2 Bl. 183. each has a several right of entry — But neither has a right
Co Lit. 200. by himself to do that which may injure & destroy the right of his Co-tenant.— On this principle by the Statute Westt. 2. c. 22 it is enacted that one joint-tenant may sue another in waste. So too by Stat. 4 Ann. an action of account is given which would not lie at Com. Law, unless one Joint-tenant had made the other his bailiff or receiver.— This account will be fairly taken, & the tenant in possession is compellable to account for the surplus over & above his share of the nett proceeds which he has received. and he is accountable for that only.—

By the Eng. Law there is incident to all es-
Co Lit. 280 b tates holden in Joint-tenancy, a right of survivorship,
2 Bl. 184. "jus accrescendi."—

This doctrine is rejected in the mercantile law, & in case of joint ownership of stock on farm in Eng. and in Com. it is entirely exploded.—

One joint-tenant may at any time convey his estate
Co Lit. 292 to a third person (which makes a severance) In Eng. however
2 Bl. 186. he can never devise it. But in Com. a Joint-tenant may
Co Lit. 185. devise his estate.—

Joint tenancy.—

At Com. law no real estate was devisable, it is the Stat. which rendered it so in Eng. Estates holden in joint tenancy were expressly excluded.— This was done on the ground that from the very nature of an estate in joint tenancy, a Stat. rendering it devisable by one joint-tenant would be inoperative.— For say the Eng. books the title of the surviving joint-tenant takes effect instanter upon the death of the other; & this having more agility than any other title can have, would exclude the idea of a title being given to the devisee.—

Sur. Ken. 12.

By the Stat. of Wills in Con. & most other States all estates are made devisable. In those States which recognize the jus accrescendi it would be a curious question under such a Stat. whether an estate holden in joint tenancy could rest in the devisee. Mr. Preston thinks that it would.— Sed quere. 2 Bl. 186. Co Lit. 185.—

An estate in joint-tenancy may be severed in various ways or modes.— 1st. By agreement of the owners. Before the Stat. frauds & perjuries this was done by making a partial division merely, but since the enacting of that Stat. (The Stat. of frauds & perjuries) all agreement of this kind must be in writing.— It is therefore necessary after the Stat. is made partially, that mutual deeds of quit claim pass between the joint-tenants.—

Joint-tenancy.

27. By Com. law no one joint-tenant could compel the others to make partition of the land. But by ~~Stat~~ 31 Hen. 8 c. 1 & 32 Hen. 8. c. 32. a severance may be compelled by one joint-tenant. This is done by bringing a writ of partition. The mode of accomplishing it is as follows; a Joint-tenant wishing to compel a partition ~~states to the court~~ (either of law or equity) that the estate is holden in joint-tenancy, & that he wishes a severance.

On this the court issue a writ to the sheriff commanding him to take a jury of 12 men to make partition. This if done fairly, correctly, or not objected to, is final.

In Con. the Sheriff takes three men only, & his return when once made, is of course ~~final~~ recorded and at all events conclusive. This is a great defect in the Con. code and needs correction.

3. The estate in joint-tenancy may be severed by an alienation of one of the joint-tenants which destroys the unity of title. So by destroying any one of the constituent unities, the estate in joint-tenancy is itself destroyed. 2 Blac. 185.

II. Of Estates in Coparcenary.

Co Lit. 252. 181. 265. 183. This estate is always created by descent, & happens when an estate of inheritance descends from an ancestor to more than one person. At Com. law, it includes females only, & 2 Inst. 405 2 Bl. 188. their legal representatives, to whom the estate descends as co-heirs, are termed co-parceners or more briefly parceners.

By the custom of gavelkind lands descend to all the males alike, who of course take as co-parceners.

By the law of Con. all the children inherit as coparceners, female as well as male without distinction.—

Estates in Coparcenary must have the unities of interest, of title & of possession, in the same manner as estates holden in Joint-tenancy. The unity of time however is not required.— For if J. S. dies, leaving A. & B. his heirs tenants in ~~common~~ Coparcenary & Co Lit. 164. 174. A. dies leaving C. his heir, B. & C. are still tenants in Coparcenary, tho' the estate vested at different times— Yet the descent must have been cast at the same time.—

The Coparceners can maintain an action of waste against each other. Partition might be compelled at Com.

6 Lit. 163. 164 2 Bl. 188. law; & there is no jus accrescendi in coparcenary. These are the most material respects in which it differs from joint tenancy.

III. Of Tenancy in Common.

The only unity necessary to constitute a tenancy in common is that of possession. There need be no unity of time, title, or interest. But the interest of tenants in common is joint as to its possession merely. Every estate holden by a joint possession, not being a joint tenancy

2 Bl. 192. nor not coming by descent, is of course a tenancy in common.

Whenever an estate of joint tenancy or coparcenary is dissolved, so that there be no partition made but the unity of possession continues, it is converted into a tenancy in common.

It may also be created by an express limitation in a deed, when the conveyance is equivalent to a tenancy in common.

Each tenant has the whole of an undivided half, or moiety; a tenancy in common of not an undivided moiety of the whole as in joint tenancy; but no one knows of his own severalty. They all therefore occupy

Tenancy in Common.

promiscuously.—

Tenants in Common are compellable to make partition by Stat. Hen. 8th. There is no jus accrescendi in a tenancy in Common. If the tenants may sue separately in Eng. as well as here. In other respects it agrees with other estates holden jointly.—

Lands to be given to A. & B. "to be equally divided between them" have been holden to be given in Joint tenancy, when the expressions were used in a deed, & in common, when used in a will. Mr. Reeve supposes the words ought to be construed alike in both instruments.—

It is laid down that where one tenant in common is forcibly turned out of possession he may bring an action of ejectment against his Co-tenant. It is to be remarked that he can do this merely for the purposes of getting into possession himself, not for that of ejecting his Co-tenant—

One joint owner of an estate may hold for so long a time as to gain an exclusive title to the estate against the other joint owners, tho in common cases, the stat. of limitations does not run upon this species of estate. This can happen only where the tenant in possession holds it by a possession adverse to that of his Co-tenant. See 1st Com. from page 192 to 194 inclusively. Esp. Co. 2:433 for upholding adverse possession the best authority.

Comp. 217.

Tenancy in Common.

Tenants in Common in Eng. must bring several writs to recover their their Estate held in Common, & cannot join. But in Connecticut ~~th~~ our Courts have decided that they may join or bring separate action at their election. For all Trespasses committed on their land they must join to recover damages, & cannot sue separately. To recover a thing, which in the language of the law is <u>impartible</u>, they must join in the action

Of Devises.

The term devise when properly used signifies a testamentary disposition of Real Property. Wills are the instruments by which a man conveys personal property.

Devises were by our Saxon ancestors, before the Norman conquest introduced the feudal system in its perfection. The manner of devising at that time is enveloped in uncertainty. By the feudal system all alienations without the consent of the Lord were restrained; Devises as well as other alienations. Indeed the restraint upon alienation by devise continued long after that upon alienation by deed had ceased.

The introduction of the ideal estate of uses distinct from the legal interest gave rise to the practice of devising the use; for in the Court of Chancery the cestui que use, could compel the trustee to execute the Devise, & even to convey for his benefit. But when the Stat. of uses had annexed the possession to the use, these uses being now in view and itself, became no longer Devisable. This consequence exterminated that kind of devising, & not on the Stat. of Wills 32. Hen. 8th c.1 & explained by 34 Hen. 8th c 5. which gave to all persons possessed of lands in fee simple (ex

Stat. uses 27 Hen. 8.

Devises.

ept it were in Socage tenancy) a right to devise with certain restrictions as to the quantity devisable, (which were afterwards taken away by the Stat. Car. 2.) and as to the persons to whom it might be devised. The explanatory Stat. of 34 Hen. 8. excepted Femes covert, Infants, Idiots, & persons of non sane memory. But Stat. in Chart. does not except Femes Covert.

There is a remarkable difference between the construction of words in deeds and wills. In a will certain words which if used in a deed would convey no interest, will convey an estate.

In a deed the word heirs is necessary to create an estate of inheritance, but in wills any words expressive of the intention of the testator, to create such an estate will have that effect. The general rule is, that the intention of the testator is to govern. But this rule may be misunderstood too broadly; for no estate can be conveyed by will which could not previously have been conveyed by deed. The Stat. of wills confers no power upon the testator to create a new Estate; but merely to dispose of his estates under the previous restrictions which existed upon the alienation of lands by deed.

This rule understood with the preceding qualifications is a very important one in devises, & will solve a great

Devises

number of cases which have been decided.

The rule then is merely this, that in the construction of Wills, technical expressions yield to the intention of the maker of the instrument; in that of deed they prevail. This rule however says J. Reeve, will not warrant executory devises, which where unknown at Com. law; & they may be considered as an exception to the general rule. It is not the intention of J. Reeve to explain executory devises in this place, but he will just mention the manner in which they originated. At Com. law no estate of freehold could be made to commence in futuro. & if a remainder was limited it was necessary there should be some intervening estate to support it. - Courts however took upon themselves to determine, that by devise such estate might be created, without any intervening estate to support it, & this then termed an executory devise. -

The operation of a will may be very different upon real & personal estate. - Supposing J. S. makes a will giving all his real estate to A. if he afterwards purchase real property, it will not pass by this devise. - But if he gives all his personal estate to A. all he despossessed of, will pass. - It will then operates upon re-

2 Wooderson 347

1 Salk. 237 238

Devises.

al property from the time of its date, upon personal property, from the time of the testators death.

The effect of a republication of a will is to give it efficacy from the time of its republication, & is in effect giving it a new date. A devise then of all real property made before the purchase of other estate of the same description, & republished after such purchase, will operate as well upon the estate intermediately bought, as upon that originally devised.

First ref. 196. Wills are inoperative until the death of the testator. They are therefore ambulatory, liable to revocation ex-
2 Mod. 177 press, and implied. Indeed before the Stat. of Frauds Car. 2d they might be revoked by fraud, when such revocation was made solemnly & animo revocandi.

1 L. Ab. 251. No particular form of expression is necessary in a Will. Under the Eng. Stat. it has been questioned whether a possibility i.e. an estate
1 Mod. 177. depending upon a contingency could be devised. For
Dum. 1731. 1 Ab. 30. even it was holden that it could not, but must go
Sow. 35. to the heir, but it is now settled that they are devisable even before the contingency happens.

Sym. 91. If an estate were granted to A. & his heirs in
ante vie, his heirs would take during the life of the

Devise

cestue que vie. — Now as the word heirs in this case, is
Co. Lit. 58. merely a word of description, it would seem that the owner
Co. Lit. 41. might dispose of the estate by devise. — But by the Eng.
Stat. estates for life are not rendered devisable, &
it therefore remains as at Com. Law. — But now by
Stat. 29 Car 2. c. 3 & 12. (Frauds & perjuries) Estates
per autre vie may be devised by will, having the
requisites of that Stat. — ~~Com. Dig. 135.~~

In Connt. all Estates are devisable, & here such an
estate would unquestionably pass by devise. Even in
Eng. in those places where all lands were devisable by
custom this kind of Estate might be devised. —

Subsequent to the original Stat. of Devises made
in the reign of Hen. 8th the Stat. of 29 Car 2. renders
other solemnities requisite to the validity of a devise.
This last Stat has been almost universally copied
by every State in the union, with very few ~~essential~~
~~variations~~ variations —

There are a number of cases under
the Stat. of Henry and before the Stat. of Car. which
have been adjudged good since the Stat. of Car.

1st It was contended between those periods that the whole
1 Burr. 548. Will should be made & executed at the same time;
Ow. v. Jones from 1 to 12 & 33 but it is now settled not to be necessary; for part may be

Devises

written at one time & part at another, & the will or devise will be good.

2. In case a man has 3. or 4. or more Wills which contemplate distinct pieces of property, & are all therefore perfectly consistent with each other. they will all be good; but if the last differs, or is inconsistent with a former, it of course revokes it.—

3. There is a case, however, where the latter will may seem in some measure inconsistent with a former one and yet both shall stand.— As where J. S. makes a Will by which he gives Black acre to A. this being all his property— He afterwards marries and wishes to give some estate to his wife, instead of making a new Will entire; he makes another giving Black acre to his Wife for life upon the condition of her paying A. £50 pr annum.— This last will operate as a revocation of the former pro tanto i.e. for the life estate given to the wife.—

Co. 8. 721.
1 Ez. 187.

4. . . . . And the point settled that period is, that a Will may be made to take effect referring to another writing, & disposing of an estate according to that writing, without inserting in the will what that writing contains. As a will conveying to such a person, such property as is ~~mentioned~~ mentioned

Co. 3. 144.
1 Roll. 531.

Devises.

in a certain instrument of writing, &c.

Judge Duer will just remark in this place that a Codicil to a Will is nothing more than an addition to a Will, which will become a part of it, & will add, explain, or subtract, from, the will to which it is an addition. —

5. Another point settled during that period, viz, that where a man mentions in a letter to a friend the way in which he should dispose of his property, this letter shall be his will. —

6. Where the devisor was in such a situation, as to render the writing of his will at the time present impossible; but gives the manner in which he wishes his property to be disposed, to an attorney; who having written it brings it for his approbation to the testator, who at that time is incapacitated to approve it — This was, (on the presumption that the Attorney obeyed his instructions) determined to be a good will. — These questions & difficulties however occasioned the 2d Stat. of Wills in 29. Car. 2.

1 Lid. 315.

This Statute declares — 1st That all devises of lands devisable either under the Stat. of 32 Hen. 8th or by custom should be in writing.

2. That they shall be signed by the devisor himself

or by some person in his presence, and by his express direction.

3. . . . They must be subscribed & attested, ~~in writing~~ (i.e. witnessed) in the presence of the devisor.

4. This must be done by 3 or 4 credible witnesses.

This is all the Stat. requires, and altho these requisites appear to us so very plain, yet almost every word, & every syllable of them have been subjects of litigation. — This Stat. has made no alteration in the form of draughting Wills. — No technics are necessary. The intention of the devisor must be perspicuously expressed. —

2 Ch. 291. A Will when made in a foreign Country, the Devisor omitting the statute requisites from an ignorance of them, will be good. — But when this ignorance does not prevail, all devises must be made according to the laws of the Country where the land lies.

It is common, in men in making devises to give power to the persons to dispose of certain property.

1 Ch. 740. 2 Ch. 268. 295. 2 Ver. 179. The property is in the Will, & in case the will made by the master or confidential person should want any of the legal requisites, it will not be good. The Will to the appointees must have the legal requisites.

Judge Reeve will now consider these requisites in their order. And

I. That the Devise shall be in writing needs no comments.

Devises.

II. That it should be signed by the Devisor or by some person in his presence & by his express direction incl. as some consideration. With respect to signing what is it? When
3 Mod. 219. the Devisor writes his name himself at the beginning of the Devise, it is sufficient. In this case three of the Judges determined that sealing was signing within the Stat.

The next question was, suppose a man had written
2 Atk 764. the whole of the devise, & the devisor himself had sealed it,
1 Wils. 313. would this sealing be a signing within the Statute? It has been determined that it would not. —

A other question has been made. — Suppose a Devisor attempts to sign, and thro' incapacity, cannot. It will not be good. The rule is that whenever you have
Doug. 229. complete evidence, that the Devisor intended to sign,
R.d vs Pine and did not it will not be a signing, but where he writes his name at top, & there is no evidence of an intention to sign at bottom, it will be a sufficient signing.

III. A third requisite to the validity of a Devise, is, that it shall be attested & subscribed in the presence of the ~~testator~~ Devisor. To what then do they attest? 1. To the corporal act of signing by the Devisor. — 2. It is said that witnesses attest to the sanity of the ~~testator~~ Devisor, tho' Reeve supposes they do not. —

But what is an attestation to signing? It is settled

Devises.

2 P.W. 506.
2 Ver. 445.
3 P.W. 253.
2 Atk. 182.

That an acknowledgment by the Devisor to the witnesses that he himself did sign the will is sufficient to enable the witnesses to prove the will, altho they themselves did not see it signed.—

Any thing short of this acknowledgment & this way, will not validate a devise.—

But the witnesses

Carth. 81.
1 Salk. 395.
1 Bro. C.C. 19.

must subscribe in the presence of the testator. What then is to be construed "in the presence of the testator"? It has been settled that if the subscribing was done in the "possible view" of the testator, it will be sufficient. i.e. if the testator could have seen the witnesses sign it, it will do.—

1 P.W. 740.

But if the testator could not have seen, it will be insufficient: for it has been said & it is probably law that altho the witnesses were in view, yet but secreted themselves at the time of signing, i.e. the testator should alter his mind, this fraud vitiated the devise.—

It has also been decided that where the testator was surrounded by curtains, & might have seen the witnesses sign, it will be a sufficient signing in the presence of the Devisor, for he might have had a view.

Who the witnesses do subscribe in the corporal presence of the testator, yet if he was deprived of his mental faculties, so as to incapacitate him to exercise, it will not be subscribing in his presence as contemplated by the Statute. There must be a capacity.

Doug. 229.

How the subscribing is to be proved when the question comes up at law.

The first is that the witnesses may not only swear to the testators signing, but also to their own subscribing.—

There is a great convenience in all the witnesses being present at the time of their subscribing for if this is the case one may prove the whole i.e. the signing of the testator & that of the other witnesses

There is an inconvenience which sometimes arises, & which sometimes is insurmountable, indeed many wills are thereby defeated: & it is where the witnesses are all dead. It is true that in this case you may prove the hand writing of the Testator & also of the witnesses, but this does not prove that they subscribed in the presence of the testator. This in fact is not proved. The Courts in such cases lay hold of all the circumstances of the case, & from these may infer the subscribing in the presence of the testator. But

Com. Dig. 531.

1 Pick. 741.

Dorsey.

where there are no circumstances from which such inference may be drawn, the Court will presume the instrument to have been regularly ~~drawn~~ executed.

But suppose there is one witness, & he did not see the others subscribe? In this case the hand writing of the witnesses must be proved. However J. Reeve does not see why this proof should not be admitted, altho' it is a quæstio vexata in England. — Parol proof will clearly be admitted. But suppose ~~one~~ one witness comes into Court & swears to all the requisites to the validity of the will i e that the testator signed, & that himself & the other witnesses subscribed in his presence, & another witness swears directly contrary? In this case the credibility of the witnesses as to the fact will be judged of by the triers. But Courts are so much inclined to favor the due execution, that one witness swearing to it when supported by circumstances, has been believed in preference to those who swear directly the contrary. — But it is held that those witnesses attest not only to the fact that the testator did sign, but also to his sanity at the time of signing, & (yet strange to say) these same witnesses will be allowed to prove his insanity — to contradict themselves. — The fact is, that their testimony may be re-

1 W. & S. 365. a strange case

battled by that of others, & the matter will be left with the
Tha. 1096. triers. —

There is a case which seems to contradict the doc-
Bum. 1224. trine "that witnesses may contradict themselves. --

As to the number of Witnesses.

The Statute declares that there must be
Eath. 35. three or more witnesses. -- Cases.

1 Show. 68. 1. A Will made having two witnesses, Codicil thereto with 2 witnesses... Now such a will as this has been held not to be good, upon the ground that he who signed witnessed the will knew nothing of the Codicil being on a separate piece of paper. There were therefore but 2 witnesses to the will. --

2. A Will to which there were no witnesses; Codicil thereto, executed w. three witnesses. The Codicil recognized the will, & yet this was held not to be a good devise upon the ground that the will was not present at the time of executing the Codicil. If the Will had been present, O Reeve supposes that the execution would have been good.

3. The will and codicil on the same piece of paper, and a sufficient number of witnesses to the latter,

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Here the will must necessarily have been present at the creation of the Codicil & therefore was held to be good.

4. A Will containing 8 or 9 separate sheets, each signed at the bottom by the testator — if the last sheet is subscribed by 3 witnesses, it will recognize the whole as one will & of course make it valid.

There has been a distinction drawn between a Will and a Codicil, but Ld Rosse confesses he cannot see it.

5. An illiterate man made a will, & being ignorant of the legal requisites, omitted to have a competent number of witnesses. Afterwards finding it out, drew up another writing altogether consistent with the former to which he had the legal number of witnesses. All constituted one will and was good... That all the witnesses must be present, see 1 Pre. Ch. 184 2 Eth. 170.

IV. A fourth requisite is that it must be witnessed by 3 or 4 credible witnesses, & in the presence of the testator. For what purpose is the word "credible" added? Some contend that any credible person would be admitted to prove a will, & therefore Devisees them-

Devised

selves, if credible, would be admitted. Others say this must be competent witnesses. But upon the whole we may conclude that the word credible was "foisted" in, meaning nothing more than legal witnesses. In fact Reeve supposes it to be surplusage.

Question resolved. Can a Devisee so purge himself of interest in matter ex post facto as to be suffered to prove a Will which made him a Devisee? In answering this another question involves itself, which is, whether witnesse must be competent or disinterested at the time of subscribing the will? The fact is if at the time of proving the will, they have no bias on their minds, they will be competent witnesses, notwithstanding their interest at the time of subscribing. This is Reeves opinion.

A witness being a Devisee has only a contingent interest, i.e. it is contingent at the time of attesting, for the will may afterwards be altered; and is not an heir at law whose father prosecutes an action of ejectment more interested than a Devisee? And yet he can be a witness in such a case. Reeve thus favors the idea of the admissibility of a Devisee as a witness, —

Devise.

In the Spiritual Courts it was always practised that a legatee in releasing his interest, might become a witness to a Will, for to wills strictly speaking, no witnesses are necessary.

It was contended by the advocates for excluding the Devisee, that a new system of evidence was intended to be introduced by the Statute. From this hypothesis Judge Reeve entirely dissents, for Statutes do not affect the pleadings or evidence collaterally. And besides this abolition of this idea would lead to great difficulties and obscurities. Suppose the devisee at the time of subscribing did not know of the devise to himself, he would have no bias, which could on any principle exclude him. The decision in Stange was a very alarming one & built on the Statute 25 Geo. 2 c. 5. by which it was enacted that all legacies given to witnesses should be void. From this Stat. no inference can be derived which will militate against the doctrine contended for by J. Reeve, for the Stat. might as well be made in affirmance of the Com. law, as in alteration of it. In England 6. Judges have decided in the affirmative & 6 in the negative, so that now this is a great question. In Connt. this question has been

Sta 1253.
2 Bl. 377.
Burr 414.

Devisees.—

twice decided in the affirmative by the Superior Court and their last determination has been reversed by the Supreme Court of Errors. So that here also (saving leave) this is a question undetermination. With due deference to the opinion of the learned Judge, it strikes me that the question in Connt. is completely settled & at rest. For if it has been so decided by the highest law tribunal in the State, it has become the law of the land.—

V. ... There not mentioned in the Stat. it is necessary that the "devise be published". This was held necessary under the Stat. of Hen. 8. & was introduced from analogy to a deed which must be delivered.

8 Bin. 125

3 Atk. 156. Indeed a Devise may be delivered as a deed.—

Under the Stat. of Car. 2. it is not strictly required that a devise be published; but Jeremy thinks the subscription & attestation required by the Stat. of Car. to be equivalent to a publication.—

VI. It is required that the entire will be present at the time of attestation. Whether it was present or not is a question of fact, is to be left to the determination of a Jury.

3 Mod. 263
1 Ub. 5. 407.
4 Ch. 454.
3 Burr. 1773.

As has been hinted, the uncertainty of every thing human, often renders it necessary that

the great fact of the Devisor's signing the will in the presence of the subscribing witnesses be proved by slight evidence.—

Of the Revocation of Wills.

Revocations are either Express or Implied.— In Eng. there is a Statute respecting the solemnities requisite to an express revocation, which has been adopted in some States, tho' not in all. It is not adopted in Conn.—

1 Roll. 615. Cro. J. 115. 497. The greater part of revocations being implied, are not provided upon by the Statute.

Before the Statute an express revocation, tho' by parol, if made "animo revocandi" would annul a Will.—

1 Ind. 73. No expressions of an intention to revoke, are a revocation.

3 Wils. 511. 497. 1 Show. 537. 3 Mod. 263. Comp. 87. 7 Bro. P. C. 377. An implied revocation may arise from some collateral act of the Testator which absolutely implies; or by some act of his, furnishing ground to presume a change of intention; or from the mere operation of law.—

A second Will inconsistent with a former one is an implied revocation, yet if it be inconsistent with

Devises.—

the former one in any particular point, it entirely revokes the former.

In principle however it ought to revoke it only pro tanto, to the extent of the inconsistency.

1 Ver. 178. 186. A codicil may be a revocation of a former Will but not unless there be an express clause which operates as a revocation, & no further than such express clause extends; or the Codicil recognizes the former Will. —

Where a second will is made under a false impression as to a matter of fact, without which false impression it would not have been made, it is no revocation of a former Will however inconsistent with it, it may be, —

But when such Will is made under a false impression as to the law, it is a revocation. There the intention to revoke is apparent; but in the former case the rule holds to reasons of policy; for a contrary mode of procedure would produce much confusion. —

4 Burn. 2512. Suppose a Will impliedly revoked by a subsequent inconsistent one, & that such 2d will is afterwards expressly revoked, is the first Will revived? Resort to the intention of the Testator. By this J. Lewis thinks, it will generally be found the safer way to revive the first will; and so it is decided. —

But if the first will be cancelled and destroyed, it is not

revived by the destruction of the second.—

Suppose the 2d Will expressly revokes the first, & is afterwards destroyed, still the first is not revived. J. Ed. thinks the distinction not founded on principle.—

In the case cited from Cowper both the first and second Wills were cancelled, but there was found in the testator's house a duplicate of the first, uncancelled, but it was holden to be no revival of the first.—

Such a great alteration as takes place in the circumstances of the Devisor by marriage & the birth of a child is an implied revocation of a devise previously made as well as of a Will.—

Cowp. 30.
Fearn. 3 Cont. 35.
4 Burr. 2171.
2182.
7 Ray. 441.
1 Pau. 204.

So also marriage and the birth of a post-humous child work a revocation. These cases proceed upon the ground of an implied change of intention in the Devisor, arising from the alteration in his circumstances. It has been said indeed that unless the devise works a total disinheison of the issue, the circumstances abovementioned, do not amount to a revocation, but J. Reeve thinks this by no means correct, but that the intention of the testator is exclusively to govern.—

5 Term. 49.
2 Bl. 502.

It was formerly contended that subsequent insanity of the Devisor which rendered him incapable of altering his will, even if probably would have done it had he, he, sed

4 Co. 61.
1 Ven. 105.

the power amounted to a revocation. But it was otherwise determined

Another species of implied revocation arises from an intended revocation: when the instrument designed to revoke the first will is deficient in some essential requisite to its validity as a will yet it shall operate as a revocation. This is also on the ground of the intention of the Devisor. Judge Reeve observes that the principle seems hardly to warrant the decision, for certainly in such cases the land cannot pass to the Devisee in the second devise because it is different, & inoperative as a Devise, but it will go to the heir at law who may be a very different person from him who is the object of the devisor's bounty, & thus his intention will be as effectually frustrated as if the first will had been permitted to stand. But the law is settled and so we must be bound. —

Mon. 599.
Poph. 109.
1 Ves. 349.
1 Roll. 615.
1 Ves. 176, 8.
Brown. 32.
9 Mod. 190.
11 Co. 237.
3 Atk. 72.

The rule last mentioned applies to all devises where they are made to Devisees incapable of taking, as a corporation &c.

Hitherto Judge Reeve has treated of revocations, implied "by the intention of the testator" he will now treat of revocations which are implied from an "Alteration of the Estate" and which are therefore an exception to the general rule that "the in-

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tention of the testator is to govern." — Cases.

1 Roll. 616. 8 Co. rep. 90.

1. When a testator devises an Estate to a man & then sells it, and afterwards repurchases it, this will be such an alteration as will revoke the devise.

1 Roll. 616. 1 Vern. 92.

2. A devises to B in fee, afterwards marries & wishes to make some provision for his wife, makes a trust estate for his own life remainder in trust for the life of his wife. Where the intention was evidently not to defeat the devisees Estate in fee, & yet this was held a revocation upon the ground of an alteration. In this the Lawyer sees no reason. —

3 Lev. 118. 3 B. & W. on Mallwood 3 Burrow. —

3. But the Courts have gone even further. A. being possessed of an Estate in tail devises it, & to give validity to the devise suffers a recovery; this was esteemed & held to be a revocation on the same ground.

4. But to so ridiculous a length have the Courts carried this principle, that an intention to alter has been held to be a revocation. — As where A. seized in fee devises to B. afterwards thinking the Estate was in tail, suffers a recovery to dock the entailment, and therefore to give validity to the devise. This was held a revocation on the

3 Atk. 803.

ground of an intention to alter. — No doubt the precedent establishing this case was made by an interested Judge, at first, & other subsequent Judges have followed like a flock of sheep. This want of adherence to the intention of the Devisor has destroyed the symmetry of the law upon the subject. —

It is an established rule that where there is an Equitable Estate, Chancery will not consider such alterations a revocation, but in legal estates Chancery will be governed by equities. i.e. in other words wherever legal estates are made equitable ones, an alteration will not be a revocation, but when equitable estates are made legal ones, legal rules govern. —

3. Ray. 240. Partitions of estates after devises will not amount to revocations.

Again; the alteration but a-

1 Ven. 329.
1 Salk. 158. but the a mortgage is no revocation i.e. ~~the~~ it is a revoca-
3 Atk. 740. 805. tion pro tanto only; for the devisee may at any time
2 Ray. 968. pay the mortgage-money & take the estate. —

But there is a distinction between the mortgage of a lease for years or a term for years, & the mortgage of a fee. As where A. owning a lease for 40 years devises it to B. — afterwards A. mortgages to C. a part of the term (say 20 years) in this case it will be a re-

3 Ch. Ca.

vocation pro tanto only at law. In Equity the Devisee may redeem at any time.

Pe 62.514. A. devises of a farm of land to B. and afterwards mortgages to B. B. being ignorant of the Will. This will be a revocation upon the ground of an intention to alter.

2. Ath. 272. Pe 62.32. In all Estates of which Chancery has cognizance, alterations will only revoke pro tanto. For such alterations as in mortgages &c are almost uniformly made for the purpose of paying a debt, or answering some other specific purpose merely, which when done, the devisors intention is answered, and the devisee will take the estate, or in the first instance the devisee may be said to take the estate cum onere.

Thus far as to Alterations, & now for other causes of revocation, which indeed may be called alterations of the Estate.

2 Wooderson. 348. note. 11 Mod. 128. 1 do 117. 3 Ld. Ray. 93.98 The act of a Stranger may cause a revocation; & to digest the following it is necessary to remember that no man can devise an estate of which he is not seized at his death. — It would probably now be otherwise decided

1 Scott. 616. A. devises an estate to B. C. dispossesses A. and holds him out at the time of his death, B the Devisee cannot take. But again; when

a devisee makes use of any fraud, coercion &c to alter the disposition it will not be a revocation. As where A. devises a part of his Real, & a part of his personal Estate to B., & also a part of each to C., both being his children, now C. not liking the disposition disseizes his father & holds him out until after his death. the Court in this case will interfere & not suffer this trick to vitiate the will.

1 Roll 378.

So also where a Stranger or other person tears up or destroys a Will, now if the contents of the will can be substantiated in any way it will not be a revocation.

2 Ven. 441.

One thing in the as to the alteration of an Estate. Notwithstanding what has been said, yet if there has been a will made, and a subsequent conveyance operating merely as an abridgment, it will be a revocation pro tanto.

i.e. devises an Estate to B. afterwards leases it to C. now this is a revocation pro tanto, i.e. for the life of C. — thus much for implied revocations. —

1 Roll. 616. Cro. 23.

In the same Statute of 29. Car. 2 in which there is a Devising clause (which has been considered) there is also inserted a clause Expressly Revoking Wills, which will now be considered. — It has relation only, to such as are therein expressly mentioned.

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Parol proof may be admitted to prove the the facts out of which revocations may be implied, but in express revocations, there are 3 specific clauses, pointing out what must be done in order to a revocation.

1. The first part is, that no devise shall be revoked, unless by some other will or codicil in writing declaring the same, (that is containing a clause of revocation) or
2 It must be revoked by some other writing of the devisor signed by himself in the presence of 3 or 4 witnesses, or
3 It may be revoked by tearing, burning, cancelling or obliterating the same.

If a second Will is made without a clause of revocation, it will imply one; but this revoking part of the Statute was made to prevent parol revocations by the testator. Before the enacting of this part of the Statute any parol declarations significant of the testators intention, or any instrument of writing whatever was a revocation. This was at Common law.

The first and second requisites are only restrictive & do not introduce any new law. They only exclude any writing or any parol declarations

being revocations, except such writing is signed with the same rites.

I. Bat as to revocations in Will or codicil, and

II. as to revocations by some other writing signed by the testator in the presence of 3 or 4 witnesses, which will both be considered together. —

When you judge of a revocation of a Will, (i.e. a 2d will) the first question to be determined is whether this 2 Will be a good one. Whether it be duly made and be a good disposing will as well as all the statute requisites; for if it is not it will by no means be a revocation. If it is not a good disposing will, but will come under the 2d clause of "a writing signed by the testator in the presence of witnesses" it will not be a revocation. The rule is this: that if a man attempts to dispose of property by the same time & the same instrument, attempts to revoke a former Will, it will not be a revocation unless the second is a good disposing Will. But if the object or intention is not to make a disposing Will, the instrument being signed by 3 witnesses, will be sufficient to revoke a former will. — Cases —

A devises to B. a good Will. The revokes a disposition of the same property to C. — Now the ins

in their special verdict, found that there was a first, and also that there was a second will containing a clause of revocation, but because the witnesses to the 2d will did not subscribe in the presence of the testator, the will was not good, and therefore not a revocation. —

2 Vern. 253.
1 Show. 99.
Carth. 79.
2 Salk. 172.
1 P. Wms. 343.

You have already inferred that a Will may be revoked, by a will or Codicil duly made & according to the devising clause of this Statute, and that you may also revoke a devise by an instrument, which for distinction's sake the Reverend will call a revoking will which need not have the requisites of a devising Will.

In Connt. there is no revoking clause adopted; therefore the devisor may revoke by any writing signed by himself and significant of an intention to revoke. I Reeve does not know but that there may be a parol revocation in Connecticut. —

III. A devise may be revoked by the act of the devisor, in burning tearing cancelling or obliterating such devise. These acts or any one of them to be sure would revoke a devise at Common law before the Statute; but this does not render a consideration of this part of the subject the less necessary. —

But let it be remarked that these acts themselves do not con-

constitute a revocation. The intention must be referred to; for if any one of these acts be done in accident, it will by no means be a revocation. But in general if a man attempts to destroy the devise, if it is manifest that he aims at its destruction it will be a revocation.—

Cro. E. 52.

To prove the "quo animo" i.e. the intention which influenced the testator in meddling with the Will, parol proof must be admitted as the best evidence which the nature of the case admits of.—

1 P.W. 346.
2 W.Bl.
"Devises" i.e. in the index.

There are cases where a man commences the destruction of his will, if for some cause stops, yet the Will will not be void but will stand. As where a man having a Will, wishing to revoke it makes a second Will, and before the 2d is [illegible], this till he commences burning up the old one, finding the new one properly executed... but finding it not so he rolls up the old one carefully, [illegible] puts it away until the new one should be properly authenticated; in the interim however he sickens & dies... now the new one having been witnessed it has been determined that the old one stands. and this (I suppose) upon the ground of intention of the testator.—

No matter in how slight a manner the testator burns, tears, cancels, or obliterates his will, yet if it be done "animo delinquendi", it will be a revocation.

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If however the Will is merely cancelled, and not at all torn, or not quite or not in the least cancelled or obliterated. It will probable not be a revocation express, without the Statute, tho' it might have been cancelled "animo destruendi."

Sutton vs. Sutton Cowp. 812.

One distinction further. It has been held that when a testator has made some obliteration, so as not materially to affect his first design in destroying, it was no revocation. As in case where the Devisor altered "400" to "450." the word "daughter" to "daughters" &c and this without materially affecting his first disposition. See page 459. Revocation. in the margin.

Of the Republication of Devises.

A will or devise may be impliedly (and Preame seems to think expressly) revoked, and a republication of the same will, will revive it.

It is a rule which must not be lost sight of, that Real Property purchased after the making of a Will will not pass by the same will; but personal property purchased subsequently will pass by it. Real property will not pass because it is capable of being clearly ascertained, defined, and identified. If if not mentioned in the first Will, is supposed not to be intended; but personal property is

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vacant, unsettled, & very often unascertained, therefore it is improper to be contemplated by the ~~testatrix~~ testator.

Leasehold Estates subsequently purchased will not pass, altho' accounted personal property, & this is because they partake of the certainty & identity of Real property.

Lure Fee Simple.

The republication of a Will causes the land purchased subsequently to the making of the Will, to pass - i.e. all the land purchased previously to the republication, operates from the time of republication. It speaks the same language as if it was actually made at that time.—

But be careful to observe, that a republication will not pass what was not mentioned or intended ~~at the time~~ in the Will in the first instance. Ex. gr. Where the words in a Will are "I devise &c all my lands being in Litchfield". this will pass all the lands lying in Litchfield & purchased subsequent to the making the devise, & previous to the republication - but lands subsequently purchased ~~and~~ lying in ~~Plymouth~~ not mentioned in the will will not pass.—

Cro. El. 493.
Com. 381.
3 D. & W. 329
1 Ver. 437.
1 Sc. W. 275.
5 Co. 68.

Have having pointed out the effect and operation of a republication, will now consider what is necessary to constitute one.—

Before the Statute of Frauds & Perjuries any words spoken by the testator "animum republicandi"

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with reference to the will would have been a good republication. But since the Statute of Car. 2. no express parol republication will be good. Yet there is no clause in the Statute which says that an express parol declaration will not be a republication. — There is no clause requiring a written instrument to make a republication, as there is in case of revocations. — The determinations which require a writing signed by the testator, proceed upon the ground that the republication of a will, is making a new one; but I Reeve does not see why this reasoning would not as well operate before the Statute as since. —

There can always be substitutive or implied republications as well as implied revocations

A republication to be good must be in writing & executed according to the Statute of Frauds & Perjuries; because were this not the case, parol proof must necessarily have been let in to prove a republication i.e. a disposition by the testator: which was the very evil the Statute was intended to remedy.

If you are about to make an express revocation, it is necessary that you write the same will over again, and altho' it need not be subscribed by the witnesses, yet the testator must sign and acknowledge it in their presence. —

Pow. D. 665.

A parol republication however, will pass personal property purchased subsequently to

2 Ath. 539.

Devises.

1 Ves. 440 to the making of the Will & previously to the republication
9 Mod 78.

A Codicil to a Will made and executed according to the Statute, i.e. the devising clause, will republish the
2 Ver 498. will to which it is a codicil. . . But it was a doubt whether there should be a clause in the codicil, shewing the testators intention to republish.

It has been questio vexata whether a Codicil to a will, executed according to the Statute,
3 Atk. 180. without a clause of republication, will republish the Will? It is the opinion of Dr Hardwicke that a Codicil so made did republish it, upon the ground that whatever makes a Codicil must contemplate the will, because its very quality is to alter or subtract from the will.—

Another questio vexata has arisen whether it
Cro Cl. 493.
1 P.W. 168. will make any difference whether the Codicil was one of real
1 Burr. 514. or of personal property? It has been held that if the Codicil is annexed to the will, it will be a republication, if its subject matter be personal property only.—

But what difference does it make whether the Codicil
Com. rep 381. be annexed to the will or not? Altho' 1 Burr 621. & 1 Ves. 149
1 Ves. 437. are contra, yet Ld Reeve says the current of authorities
Cowp. 158. make the Codicil a good republication of a Will disposing of real property even tho it be not annexed to the will

The doctrine relative to making a will, speak

from the time of its republication, is certainly sound & observed in all the cases. — But let it be remarked, that if a Codicil republishes a Will, yet it does not give it new properties. It will only give it operation as the same will from that time.

1 P. W. 275.

Suppose a Will and a codicil are both made at the same time, or same day, can the executing or signing the Codicil be applied to, or validate the Will. It may be altho there are two authorities which seem to be contra. however I receive suppose that they were not intended to contradict the principle. — 2 Atk. 599. 3 do 176.

2 Ver. 270.

2 Ver. 597.

One thing further. A Will made by a minor will be good if republished by him after he comes of age. — —

1 Jid. 162.

Of the admission of Parol Evidence to explain both latent and patent ambiguities arising from Devises.

With regard to the admission of parol evidence to explain both wills & deeds there is not so much real difference as may at first be conceived. That is nearly the same evidence may be admitted as to both. —

It may be laid down as a general, if not an universal rule, that no parol declarations of a testator

5 Ves. 69.
2 Ves. 98.

Devises.

1 Vez. 189.
2 Atk. 216.
373.
Prov. 345.

of what he intended are admissible to explain, alter, enlarge, diminish, or rescind his will or to give it any import or make it any way different from the will itself. —

Notwithstanding this rule, there are a very few cases where the declarations of the testator, previous or subsequent to the making the Will have been suffered to be proved. — But these were declarations not made with a specific reference to the will. They have been merely the testators story, indicative of the manner in which he intended to dispose or had disposed. —

There is no testimony so vague, uncertain, & precarious, as that which refers to what a man has said. Men understand the same language very differently. Indeed what they assent at one time, they may conceive of, and think quite differently of in five years after. Hence the propriety of the general rule above which goes to cut off testimony of the declarations of a man in his life-time.

It will probably be asked what then may be proved by parol concerning deeds or wills? The answer is, that you may prove matters of fact by parol from which conclusive & satisfactory inferences may be drawn. As in case of Mortgages where a man sells land, & keeps the deed himself or remains in possession — now parol proof of these facts is satisfactory evidence very often, that it was

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not an absolute sale. These facts are such as may be proved without danger of misrepresenting, or misunderstanding, for let it be remarked that the Statute of Frauds & Perjuries, was enacted not only to prevent frauds & perjuries, but the innumerable Mistakes which were introduced, previous to the enaction, from the admission of parol testimony.

It is to be observed that no avarment will be suffered to be made unless it "stands well with the will" i.e. does not in any degree contradict the will. Any fact which "stands well with the will" & from which the intention of the testator can be collected may be averred.

There are sometimes doubts which arise concerning the Will, & which may be explained by facts dehors the will, & these are called latent ambiguities. Parol proof will here be admitted to explain the testators intention. I mean parol proof of those extraneous facts. As where a man devises property to his son Thomas, & he has two sons of that name. Also in case of a devise of "Blank Acre", and the devisor has two farms of that name. In this case parol proof will be admitted to explain the testators intention. Also where a man made a devise to his children naming them, viz. [illegible] & [illegible] and [illegible] for [illegible]

360.135.

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proof was admitted for this fact. In all these cases of latent
5 Co. 68. ambiguities, or ambiguities *dehors* the will, parol proof
2 P.W. 137. of some extraneous facts may be admitted to explain the
testators intention but no evidence of any of his decla-
rations.

But if this ambiguity appears upon the face of the
will upon reading, it is not *dehors* the will, & is there-
fore an ambiguity patent. Now if the ambigu-
ity is so great that it is impossible to form any opin-
ion of what is intended, & no sense can be made of it.
no parol proof can be admitted, & the will must there-
fore fall, but if the testators intention can possibly
be collected by taking the whole together the will is
good. ---- As to the first. -- Where lands were de
2 Ver. 634. or. 624. vised to one of J. S. Children, & no one could pos-
sibly tell which was intended, this destroyed the will,
for no parol proof could be admitted to prove the in-
tention entire. -- Also a devise to S. to the use of hae-
redum secorum & the latin was here so corrupt as to
give no data from which to form any opinion who was
2 Bulst. 180 intended, & of course the Will was nought. —

But a devise to A. B. there being two of that name
1 Salk. 7. but living in different places. Now parol proof was ad-
6 Mod. 199. mitted to the fact that he knew nothing of one, & of course

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the other was intended.

Where the ambiguity arises from the sentences of a Will, a construction must be given to them if possible, therefore no parol testimony can be admitted to explain.

2 P.W. 136. As a devise to the right heirs on any mothers side. Now to know what heirs a construction must be given

Ambiguities dehors the Will. It has been observed, & is necessary to be remembered, that no averment can be admitted unless it "stands well with the will" A devises £500 to the 4 children of his cousin Ce. B. Now Ce B had 6 children; shall parol evidence be admitted to explain which 4 was intended? Yes; for it will "stand well with the will." This is one of the cases where parol testimony was admitted. So to what the Devisor had said (which was a story of what she had done) & having no particular reference to the will in question.—

2 P.W. 116.

2 Ver. 216.

A devised £400 to the children of Ce. B. Here testimony will not be admitted to prove what 4 children were intended, because it would not "stand well with the will".—

A legacy of £500 is given to a Charity School in Kent. But here were two Charity Schools in Kent. Here ~~the~~ parol proof of the devisor's partic-

1 P.W. 074.

Devises.

lon love for, & attachment to, one, was admitted, and deemed satisfactory.—

Cases of False Description

wherein parol evidence is admitted to explain Wills, but would not be admitted as to Deeds. — As if the devisee is named by a wrong name, yet if it was evident from any description given that he was intended, he may claim. —

As where a man had a niece, and called her by a nick name. — A devise to her by this nick name, but a description of her, for the devisor had other nieces. Here the Court let in evidence to
2 Atk. 240. prove the circumstances from which it was inferred that she was meant. —

So also where there were
1 Atk. 410. 2 sons devised to, by nick names —

So also where the devisor forgot the name of
8 Vine. 197. the Devisee, but devised to him describing him as being in the service of the Duke of Savoy.

No proof like this would be admitted in cases
2 Ver. 218. of deeds. The rule only extends to admit evidence that such an one was described. —

(Where there is a Devise giving £500 to Mr.
2 Atk. 240. leaving the name Blank) It will be void, for no evi-

dence will be suffered to to explain who was intended.

Ambiguities patent arising from Equivocal words

— Parol proof is sometimes admitted to explain equivocal words, but not equivocal sentences in a Will i.e. parol proof

2 Co. 216. of facts from which it may be infered who was meant. As where two women were contemplated & mentioned in a devise, & at least in a sweeping clause, it is mentioned "I give & bequeath all to her" Now parol proof was admitted to prove who was meant by "her."

Also in case of a devise "Semore fuero" parol proof was admitted to ~~fix~~ ascertain whether a son or daughter was intended as devisee.—

Again: The circumstances

6 Co. --- of a mans family may introduce ambiguity; as where there is a devise to A & his children. — Now the word children in its legal signification has a different meaning according to the State of a person to whom lands are thus devised. — If lands are devised to a man & his children, it will go to himself & them in equal shares as tenants in Common, and in this case the word children will be a word of purchase. — But if he has none the word children will be understood in the same light as if the devise had been to him, & the heirs of his body that is, it would be an Estate-tail, and in this case the

Devises

word children would have been a word of limitation. Now parol testimony will be admitted as to the fact of his having, or not having children. —

The following case depended upon the words "I devise to A the whole of my Estate". It is thought proper to observe that previous to the Statute of Wills nothing but a life Estate could pass by the word "Estate" in a deed. — There must have been the word heirs, to make it a fee simple or a fee tail. — But after the practice of making Wills was introduced, the intention of the testator began to be attended to. — If it was clear that a larger Estate than one for life was intended to be given, it would be construed as an Estate absolute. — But where a man devises all his Estate to A for the payment of debts, and it so happens that his personal Estate will not pay all, does his Real Estate pass? This was long a question, but it is now settled that parol evidence may be laid hold of to prove the circumstances by which it may be collected what Estate the testator intended. — In this case that the personal property would by no means satisfy the demands, & that therefore the devisor must have intended to pass his real estate. —

3 Keb. 49.

3 Burr. 1899.

1 Burr.

It is now also clearly settled that a devise of all one's

Devises.

Estate, will "ex vi termini" pass an Estate in fee simple altho' it is not the case in deeds.—

In all these cases of equivocal terms, parol proof will be admitted of circumstances which may make clear the intention of the Testator.—

But this doctrine of admitting parol testimony is carried still further.... "For words not equivocal, now attended "ed with any apparent ambiguity, may, when applied "to testators property, throw light upon these words, by "averments respecting the state of property, and by "these means receive such a construction as will suit "the state of that property, tho' contrary to ~~that~~ what they "technically import."— Case.— "I give to J.S. the house called the Bell Tavern". So far then there can be no doubt. For in England where a thing is named, per se it only passes a life estate; tho' in Conn. it passes a fee simple. The word Estate, is therefore not equivocal. It has a certain definite meaning.— The facts were however, that J. S. was already tenant in tail of the Bell Tavern, of the devisor, & had only the reversion after the Estate tail was spent. Upon the death of J. S. tenant in tail without issue of his bod. the Tavern was claimed by the heir of the devisor. Now the question was di: the reversion pass by the devise of the Bell Tavern?—

Wms. 509.

1 Salk. 234
2 Ld Ray. 831.
1 Bro. P. Ca. 108.

1 Salk. 234.
2 Ld Ray. 831.
1 Bro. P. C. 108.

Dillwyn.

Parol evidence was let in to prove the circumstances, which when taken altogether were conclusive to prove that the devisor intended to pass the remainder notwithstanding the words were unequivocal. It was determined that he intended that he intended to give a different Estate from ~~that~~ what the words technically import; an estate in fee simple. Judge Holt being contra, a writ of error was taken but Judgment was affirmed.

Lastly, a case turning upon the ~~case~~ cause.

A woman devised £100 ~~pounds~~ stock in long annuities to B. — £100 stock in long annuities to C. — £100 stock in long annuities to D. — £100 stock in long annuities to E. — & the rest & residue of her Estate to the Farmers — But it turned out that the woman had in all but £120 stock in long annuities per annum. She must have ~~been~~ intended to raise ~~£~~ £500 by an absolute sale of the annuities which could be done if each devisee would then have his bequest, & there would have been a remainder for the Farmers. Here parol evidence was admitted to show the state of the property notwithstanding the terms made use of were ~~made~~ unequivocal. This was assumed in the House of Lords. — The general rule which ought to be here laid down is "that no hard proof shall be admitted unless it stands well with the Will," & neither will any evidence

Sewell 514.

1 Bro. Ch. 472.

Devise.

be admitted unless it stands well with the will. nor to contradict the least operation of words in a will.

The case cited in ~~Vin~~ Vez. before referred to, of a Devise to Cousin C. B. & 4 children. She having 6 children land proof was admitted to shew what 4 children the testator meant. But in the same will, there was a gift to 3 children. An attempt was made to introduce parol evidence to shew that by this, the same 4 children were intended, but not admitted, as it did not stand well with the will.—

Salk. 6a. 240. 2 Atk. 261. 9 Ves. 195.

It has been said that where a devisor appoints his creditor Executor the debt will thereby be released, but if appointed B. & C. his Executors; one; viz B owed him £3000; after his debts & legacies were paid & satisfied, he gave the residuum to B & C. his Exors. Here parol proof was admitted to shew that this debt was not released, but was ~~appointed~~ to pay the residuary legatees, viz B who owed the £3000, & C. No parol proof could be admitted to shew the testator intended to release it. It would not have stood well with the will.—

Ves. 522 523

Where there is a devise of lands directing them to be sold for the payment of debts, it is construed according to the English rule, that they are not to be sold for the purpose until the personal property is first exhausted. As where a man made a will directing his lands to be sold for the payment of debts

Devises.

when in fact he was possessed of personal Estate to a large amount. In this case it was contended by the heir at law that the real property could not be sold until the personal was first applied. It was attempted to introduce parol proof to shew that the testator intended the personal property to be first applied but this would not stand well with the will. It would contradict the legal operation of the writing which can never be done. —

Equity. It has already been stated that whenever there
2 Bac. 426. is a will, giving no legacy to the executor, yet if there is any property remaining after the payment of debts & legacies, the residuum will go to the Exr. in England. It is however different in Bancr. where the Exr. is paid for his trouble. Parol testimony was here not admissible to shew that the testator intended that the residuum should not go to the Exr.

Impress this rule well on your memory that "Whatever the legal construction is, no parol testimony can be admitted to contradict it." —

A further branch of this doctrine is, when parol evidence may (& sometimes the declarations of the testator himself) be admitted for the purpose

Of Rebutting an Equity, or ousting an implication of Law. —

Or as Powell says it
Powell 524. down, Parol declarations even of a testator are likewise re-

cases in all cases to rebut the constructive declarations of a trust put on words contrary to the legal sense of them which rebutting an Equity; for in such case the estate is in the devisee, & the avoment is in support of the letter of the will

Judge Reeves definition may be a little more perspicuous — He observes that law & Chancery have given different constructions to the same will i.e. to words in the same will. And where there is an equitable construction & a legal one, parol proof may be admitted to rebut the equitable one & thereby make way for, & let in the legal
Rev. 525. one. An example will illustrate this definition. As
2 Ver. 253. where A devises lands viz. Blackacre to B. (whom he appointed his Exr.) for the payment of debts & legacies. Now B. having paid all the debts & legacies, there was a "residuum"; the legal construction is, that the Exr. shall take this residuum, but the equitable one is that it is a resulting trust in the hands of the Exr. for the heir at law. — Now the question is can parol testimony be introduced to rebut the equity, that is, to shew that it was the testators intention that this residuum should go to the Exr.? It certainly can, for the Estate is vested in the devisee. —

Again: A makes a Will & appoints B. his Exr. directing him to give a legacy to C. & the rest & residue to himself. Now if there had been no lega-

-cy to the Exr. the legal construction would have been that the Exr. should have taken the residuum; but the equitable one is that it was in trust for the heir. But even in this case where the Exr. had a legacy independent given him, yet parol proof was admitted to rebut the equity & oust the implication of law, i.e. to shew that it was the testators intention that the Exr. should have the residuum or overplus.

2 Ves. 528.
2 Ves. 675.

It is a rule of Equity that whenever a man mortgages an Estate & dies, the heir of the mortgagor has a right to redeem. He may call upon the Executor to furnish him with money out of the personal property. But notwithstanding this rule, where a man owed money by mortgage, & on his death made his Executrix; now parol proof was admitted to shew that it was the devisors intention that his Executrix shou, have his personal Estate exempt from debts; & in consequence of this, the heir could not have aid of the personal Estate to pay off the mortgage debts, notwithstanding that by the rules of the court the same was liable to be so applied.—

2 Ves. 525.
2 Ves. 252.
Talb. Ca. 99.

But there are cases which are decided upon grounds not perfectly understood by I. Reeve, & these are where parol proof is admitted to explain the testators intention in

Repeated Legacies.— Judge Reeve

ownness it to be settled that where there are two or more given in one instrument "in totidem verbis et ejusdem generis" to the same person, they will not be cumulative: but if in a different instrument from the will, they are two legacies or more to the same person in the same words, & of the same kind, as in a Codicil &c they will be distinct & separate legacies i.e. they will be cumulative. This being the case the lecturer asks where is the necessity of introducing parol proof to explain the testator's intention in cases of repeated legacies?—

2 Ray. 1324.

It is also settled that where there is a devise say £250 to M. & K. & afterwards at a future day the devisor made a Note giving the same sums to M & K. this note was deemed a Codicil and therefore was an addition to the Will, and gave £250 more. Parol proof was here admitted shewing that the testator had declared that he would make up £500 to M & K.—

Rw. 526.

It should be particularly remarked that in all the before mentioned cases, parol testimony is admitted upon the ground of "standing well with the will."

Upon the same principle of the evidence not being contradictory to the will it has been held that parol proof

Rw. 599

Devises.

may be brought to shew that a devise is meant as a performance of a preceding agreement; for in such case the evidence is not made use of to construe the will, but to explain whether the one thing is in satisfaction of the ~~other~~ other. — as where a man before marriage covenants with his intended wife to settle an Estate on her — but neglects until near dying, & then in his devise gives her what he had covenanted to settle upon her. Now the question is can parol proof be admitted to shew that the testator gave it in satisfaction of a duty? Yes: for this will in no way contradict or impeach the devise. —

2 Ver. 323.

Parol evidence may be admitted in all cases to contradict fraud, because to divide otherwise would be to make the wills instrument to in encouraging that which it is to object to prevent. —

3 Ath. 630.

If a testator having executed a devise of lands in the presence of three witnesses to two persons as joint-tenants in fee, afterwards strike out the name of one of the devisees & there be no republication, the ~~co~~ erasure will only operate as a revocation of the will pro tanto. 3 Bos & Pul. 16.

Revocation

Of admitting Parol Evidence to explain Devises.

Judge Greenleaf has aimed to write a synopsis of the rules upon admitting parol evidence to explain Wills for the use of students, of which the following is a copy "verbatim et literatim." He has given the different class of general rules.—

1.— Parol ~~evidence~~ averments of the testators declarations of his intention at the time of his making his will, are not admissible, for if those declarations are in conformity to the Will, they are useless; & it is against the principles of the common law & opposed to the Statute of frauds to admit them to explain, enlarge, diminish, or avoid the language of the will, or give the words therein used a meaning different from, or contrary to obviously import.—

3 Wh. 275.

2. When there appears an ambiguity on the face of the Will, not arising from the use of equivocal words, but from the construction of the sentences contained in the Will, no parol proof of any kind is admissible to prove what the testator intended.

3. If an ambiguity arises dehors the Will, as in the case of two numerous Devisees of the same name, or of two Farms known by the same name, Parol evidence is admissible in this case,

Wills.

parol proof of the testator's intention, not arising from his declarations, but to be inferred from the proof of certain facts, is admissible.

4.— When there is no ambiguity respecting the person, who is intended as the devisee, he being sufficiently described, but called by a wrong name, averments may be made of the true name.

5. When an equivocal word is used relating to a person, an averment may be made who was intended.—

6. When a word is used that is equivocal, because under some circumstances it is a word of purchase, & under other circumstances it is a word of limitation, a parol averment of these circumstances may be introduced.

7.— When an equivocal word is used as to the quantity of the property devised, parol averments of the circumstances & state of property of the testator may be made, to enable us thereby to discover what quantity of property the testator meant to devise.—

8. If the words are not equivocal, or if their technical meaning will under the devise be ridiculous, & the conduct of the devisor unreasonable, such meaning not suiting the state of property of the devisor, then the state of property may be averred, for the purpose of producing such a construction of the words of the Will, as will comport with this state of property, tho' contrary to their technical meaning.—

9. Not evidence, & even parol declarations of a testator, are admissible to aid an equity.— It frequently happens that the

Devises.

construction of the words of a Will in a Court of Law, is equitable construction in Chancery. — To restore the legal construction and thus to rebut the equitable one; parol testimony of the testators intention is admissible. — This may be explained by the following case. — A makes a Will giving many legacies, & among others a legacy to B. & constitutes B. his Exr., after all the debts and legacies are paid there being a residuum, & no residuary legatee, the legal construction respecting this residuum is, that it belongs absolutely to B. the Exr.; The equitable construction is that he holds this residuum as trustee, for the testators next of kin, and will be compelled to distribute it among them. — Now to rebut this equity, or equitable construction, parol evidence may be admitted to prove that it was the intent of the testator, that the Exr. should have the residuum absolutely, & thus restore the legal construction.

R. — Parol evidence can never be admitted to rebut the legal construction, & leave in its stead the equitable one. —

II. — Parol testimony is never admissible unless the construction intended to be produced by it stands well with the Will. — This may be explained by the case in Vesey, where the testator gave a legacy to the 4 children of his sister E. B. — She had 6 children, 2 by her first husband, & 4 by her last — parol evidence was admitted that the testator intended that the 4 children by the last marriage should have the legacy, for this

Devises.

does not contradict the Will but stands well with it. In the same Will there was another bequest to the 4 children, but to the children of E. J. Parol testimony was offered to shew that the testatrix intended the 4 children by the last husband, but this was rejected, for the word "children" includes all the children and to restrain the construction to the 4 children would not stand well with the Will.

12. Parol testimony is admissible to prove that a legacy was intended as a satisfaction of a preceding agreement.

Devises

Of Executory Devises and Remainders.

In the first place, I think it necessary to make some observations on the difference between Wills & Deeds, by way of introducing the subject of which he intends to treat.

In the beginning of the last century devises, it was observed that the policy in construing Wills, was to carry into execution the intention of the testator. It is a rule of prime importance that the intention must always be governed in devises, provided it be consistent with the rules of law. Now, if the attempt is to be understood in a certain sense, there could be no distinction between Wills & Deeds. But this is not the case. In deeds technical terms are adhered to, in Wills the intention of the testator, provided such intention can be ascertained. In Wills "to simple", "all my estate", "to me & my heirs", &c will convey a fee simple; but in Deeds the word "heirs" must be inserted.

In case the intention is to be gathered in Will, provided it be not at variance with the rules of law, and not upon technical terms made use of, to convey, in deed, but to the nature of the estate given. Now if the estate is of such a nature as can be given, no matter what terms are made use of, it will pass, if it is fairly the intention of the testator that it should pass. If a man wishes to extend his dominion after his death, and therefore devises to one & after him to another &c &c from gener-

Devises.

tion to generation, it will not be good; for altho' the testator's intention is plain & indisputable, yet it is an illegal one.

There seems to be a deviation from the rule in the case of executory devises, for in these an estate can be given inconsistent with the rules of law: which is in direct opposition to the rules of law. An Executory Devise differs from an Estate in fee, an Estate in tail, an Estate for life, & an Estate for years. — It is in fact a new kind of estate. — It was anomalous. —

Remainders & Executory Devises agree in this, that they are estates to be enjoyed at some future period. The right in one case is vested in deed; in the other by will. But let it be remembered that a remainder can as well be created by Will, as by deed, — As where a man by deed gives an estate to A for 7 years, remainder to B & his heirs forever. — So he may do it by Will. —

A man cannot give an Estate by deed to commence 20 years hence, because it would be no remainder, but he could by devise. — If it is an Estate which would be good by deed, it will be an Executory Devise. Whenever an Estate is subject to technical rules, it will be a remainder: if remote, an Executory devise. —

No Estate made to commence in future will be good, unless supported by a prior contingent Estate. It is the very "prop" on which remainders stand. — Thus given to A for 7 years, remainder to B in fee.

Devises.

If one the interest he passes on limes out of the grantor or devisor to the particular ~~Estate~~ Estate man & the remainder man, & the latter will have all the privileges & enjoyment of the Estate while in the possession of the tenant for years, as the grantor would have had, had the reversion remained in him. This is a vested remainder, because the Estate is clearly in the remainder man & can not be defeated; but where the Estate of the remainder man rests on some uncertain event, or person, so that it may or may not vest, it is a contingent remainder. As where John Stiles gives an Estate to T for life, remainder to B's eldest son; but the moment he has one the remainder is no longer contingent, but vested. B's son must be born during B's life, otherwise the remainder can never vest during the continuance of the particular Estate, or so instante that it determines. But merely conveyance Estate to B for life, the reversion in fee, as a matter of course still remains in him. &c.

vested remainder

So make either a contingent or vested remainder there must always be a particular Estate. It is a rule that a contingent remainder cannot be vested upon any less estate than one for life, because the freehold must pass out of the grantor, & rest in some one at the time of granting, & when it rests upon a contingency, there is no one in whom it can rest, for a freehold Estate cannot rest in one for years. Another maxim is of so much importance as to demand a

Devises.

tention. It is "that in a deed a fee simple cannot be limited upon a fee simple", which may be done in a devise; — as when J.S. gives by a deed, an Estate to A & his heirs, but provided he dies before he arrives to the age of 21 years, then to B & his heirs; it will be void. But in a Will it will be good. —

One thing further as to the difference between deed & Wills. By deed no man can create a remainder in a lease for years. i.e. in personal property, because in law a life Estate is greater than an Estate for years. But in a Will this can be done. —

Judge Reeve has thot. it unnecessary to refer to any authorities for what he has laid down, but recommends 2 Bl. Com. 166. & Woodesons Lectures as containing all the important matter. —

Of Remainders.

"A remainder is an estate limited to take effect & to be enjoyed after another Estate is ended." As when J.S. grants an Estate to A for years, remainder to B & his heirs forever. Now J.S. has parted with all his Estate & interest, & has vested an Estate in B. The remainder is in fact a present Estate but to be enjoyed in future.

When an Estate is greater nt an for years,

Deeds.

Livery of seisin is necessary, to pass it. So a sure tree is no estate unless livery of seisin at this day in law, but the delivery of the deed is sufficient of it.

A remainder can never be limited but upon an estate which passes out of the grantor at the time of creating the particular Estate. It is not essentially necessary that the estate rest in the remainder man, for it may be a contingent remainder, but it must rest in the remainder man during the continuance of the particular Estate or eo instanti that it determines. — If it does not, it cannot exist at all. —

A remainder may be limited to take effect upon an uncertain person, or upon an uncertain event. The uncertain person must be "potentia propinqua" a probable contingency, if not "potentia remotissima" a remote possibility. —

1. As to an uncertain person. An Estate to A for life remainder to B's eldest son. now the event of B's having a son is "potentia propinqua". But an Estate to A for life remainder to B's eldest grandson, is "~~propinqua~~ potentia remotissima. —

An Estate to A for life, if the heirs of B, B not being in esse. This is also potentia remotissima. So B's eldest son named John is remote also. If this Estate is void in its creation, it can never have effect, a who, all the contingencies happen. —

2. As to the uncertainty of the event. An Estate to A for

Fallows.

life, remainder over to B, provided B survives him, now if B. dies before A, the remainder is gone & can never vest. These remainders are contingent. —

If this particular Estate which is said to support the remainder, is destroyed before the remainder vests, it can never after vest — for where the foundation is swept away, the fabric itself must tumble. —

In case of contingent remainders, the tenant for life may destroy the remainder by forfeiting or surrendering up his own Estate, as well as by his death before the remainder man is in esse. This has introduced the practice of constituting trustees to support contingent remainders — As where there is an Estate to A for life, remainder to B if he survive A. Now if A does any act by which he forfeits his Estate it will destroy the remainder. — But to prevent this has a clause inserted in the grant that D shall be a trustee to preserve the contingent remainder during the natural life of A. — This is in fact throwing another prop under the building, as was first known in the reign of Car. 1.st —

Judge Preme observes that the doctrine of remainders has ~~[illegible]~~ been called difficult. But it is difficult only as learning to be a shoe-maker is difficult. It is more mechanical & requires only attention.

In Equity it will hold good, as an Estate created by

Devises

Will to be enjoyed at some future period, yet it must be such an Estate as cannot fall under the denomination of a remainder.

1. The first difference between a Executory devise & a remainder, is that no particular Estate is necessary to support the former. As an estate to commence on the marriage of a feme sole. An Estate to A & her heirs upon her day of marriage. This is a freehold made to commence in future & upon a contingency too: as an Estate unknown at Com. law, for there every freehold must commence in presenti, if even it is to be enjoyed in futuro. This practice of making Estates to commence in futuro was created entirely by the Courts. The example above stated is not an Executory devise, because created by will, but because it is made to commence in futuro without any Estate to support it. — 2 Bla. Com. 176.

2. A second difference between an Executory devise & a remainder is, that in the former, a fee simple or any less estate may be limited upon a fee simple, upon some contingency. As if a man devises land to A & his heirs, but if he die before the age of 21, then to B & his heirs. This remainder to B, void by deed is good by way of Executory devise. But in both of these kinds of Executory devises, the contingences ought to be such as may happen within a reasonable time, because otherwise perpetuities would be created, which the law abhors. — As an Estate to B &

Devises.—

his heirs, but if no heirs one hundred years hence, then to C & his heirs. This would be ill.

The length of time which it was first determined the contingency should happen in, was during a life or lives in being.— Afterwards the time was extended, as in case of a devise to the eldest son of B, now in the first instance the eldest son must have been born before the death of B— in the 2 instance it was extended to the time at which B's son should arrive at the age of 21. which might be 21 years after the death of B.— In the 3 place, & finally the period was extended to a life in being which was the life of the mother & the subsequent infancy of her son. Making in the whole a life in being 21 years & 9 months afterwards.— The reason of this 3 advance of 9 months, was when the father might die & leave the mother pregnant with the son to whom the property was devised on his arrival at the age of 21 years. This time was allowed as the usual time of gestation. 3 Bl. 171.——

3. By Executory Devises a remainder may be created on a term for years. As a lease for years may be given to one man for his life & afterwards limited over in remainder to another which could not be done by deed, because in law a life Estate is esteemed greater than one even for 1000 years. As e.g. A may give a life estate to B in a term for years with remainder over to C. But in order to avoid perpetuity which

the law abhors with its concomitant inconveniences to society, it is settled that the remainder man, or remainder men, must all be in esse at the time of the limitation - otherwise a man might extend his dominion from one generation to another for 1000 years which would be creating perpetuities. But all the remainder men must be in esse, so that the candles may all be lighted & burning at once. Such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee.

2 Bl. 178.

The Statute of Connecticut gives remainders & executory devises upon one & the same footing. Such a Statute however, I have believes was not ever enacted in the States generally. This Statute of Conn. declares that all kinds of estates may be given by deed or Will to any person or persons in esse, or to the immediate descendants of those in esse which completely does away the mischief of law, that an estate cannot be made to commence in future. By Statute of Conn. an estate may be given to B & his heirs, or to the youngest child of B. not born. - A man can go no further, he cannot have dominion beyon the second generation.

I have will just observe in this place that there has been a great deal of foolishness in the books about the legal construction given to the words "dying without issue" as an

Devises.

Estate to B & if he should "die without issue" then to C. —
If there never had been a Lawyer, every body would have known how to have construed these words; for the meaning of them naturally would have been "without issue of his body" without extending it to future children or generations, i.e without extending it to grand-children, great grand children &c &c. But according to the legal construction a man may die without issue an 100 or one thousand years, after his natural death. This law however remains untouched in Engd, but appears to be ridiculous and spurned at in some of our Courts. —

There can be no executory devise, if it falls within the rule respecting remainders. It will not be an executory devise if limited upon an part in an estate. Therefore in order to be an Executory devise it must have no particular Estate to support it. —

Devises.

Cases exemplifying the nature of Remainders and Executory Devises.

1. A devises an estate to B his wife for life, remainder over to C. This is a good remainder vested.

2. A devises to B for life, for life, remainder to the heirs of his eldest son, his son having then no heirs. Now this is a good contingent remainder, & no Executory Devise, for it has the properties of a remainder.

3. A devises an estate to B for life, remainder over to C & his heirs forever, but if my son D pays to my son C £500 within 3 months after his mother's death, then to D & his heirs. This will be a good executory devise, for a fee is limited upon a fee. — 10 Mod. 420.

4. A further case which has been a leading one. — A devises to B & his heirs forever, but if B dies without issue living D, then to C & his heirs forever. This was an executory devise. C v. D. 596.

5. A devises to the heirs of J.S. at J.S.'s death. It is an executory Devise. — 1 Salk. 226. Cro El. 8, 9.

One word in this place with respect to the distinction between a contingent & vested remainder. — A remainder is not contingent because it may never vest, for a remainder vested in interest may never vest in possession. — A distinction may be drawn in this way

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If there is a capacity in the remainder man, i.e. if he is in esse to take at the time of the creation of the remainder, it will be a vested remainder, but if he is not in esse, he will not have capacity to take, & therefore it will be a contingent remainder.—

Of Devises conferring power to Executors and other persons to sell the Testators property.—

A man not an. has power to devise his Estate himself, but he may enable another to give away that property by Deed or Will.—

The power is given most commonly to Executors, but yet it may as well be transferred to others.—

Sometimes a mere naked authority is given to dispose of the property ~~[illegible]~~, at other times an interest is coupled with such authority.—

1. As to the first.— Where there is a devise that his Executors shall sell, that they may sell or that they have power to sell &c. it confers not a naked authority, & any conveyance made by such Executors will be valid. So that we see that the law from indulgence to Testators permits them to have some sort of dominion over their property even after their death.— Co. 6. 382. Cowp. 464. Bac. 113.

2. As to the second. Where I devise to my Executors to sell me, i.e. that they have not only a power, but an interest

Powers.

i.e. the legal title in them. This distinction Mr Reeve seems an unfounded one, for he supposes the object in each was the same; if so he thinks it will be determined in Court when the question comes fairly up. — ~~A naked authority devised to a man~~ If there is a mere naked authority devised to a man to sell, it can be considered in no other light than as a power of Attorney; and of course if this power is given to two executors, a conveyance cannot be made by one alone, because powers of attorney are always construed strictly. The conveyance must be executed jointly except it is otherwise provided in the Will. — The Executors do not take as Executors, but as appointees. But it has been determined that in case there are three Executors, if one die the other two may convey or sell. — — Also that where a man has given power to his 4 sons in law, to sell — A joint conveyance i.e. a conveyance by them all, will only be good. — But where such power was joint to his sons in law, a conveyance by any two will be good: Co. Cl. 26. 524.

If the power is given to any of them then the act of one will be sufficient. — Co. Cl. 26. 524.

It is a principle established in Chancery that whoever has such a power to sell or dispose of property can ~~dispose~~ be so compelled by so to do by the Creditors or creditors filing

Devises.

a bill in Equity for that purpose. – But the appointees are by no means compellable to act. The sale alone supposes them to have accepted, which if they once do, they are obliged to act. –

It frequently happens that men devise their lands to be sold without saying by whom. In such cases it has been determined that the executors may sell, & the sale will be valid. But how if they do not sell, & the Ecrs have no authority to compell them to do it? The Court will appoint the heir to sell, if he will not do it; the Court will appoint a trustee for the purpose. — 1 Ver. 304. —

All the difference between a naked power & one with an interest is, that in the latter case, the Exors or appointees have in them the legal title until they do sell, & therefore they may enjoy the Estate until that time – but they will be compelled to sell. –

When an Estate is given to Executors to be distributed, or to Exors to maintain children, in both these cases they have an interest as well as a power.

Anciently there was a practice for the testator to devise his property to his Exr to dispose of "for the good of his soul." In this case it seems that the heir had a right to claim, which if he did not, the Exr would be sure to sell, for it was pleasing to him to have the money to use as he wished. –

Devises.

Observations applicable to those States in which the Statute "Uses" regulates Wills & deeds.

Before the Statute of Uses 27 Hen. 8th. When a Devise an Estate to B for the use of C. the "cestui que use" was compel'd by the cestui-que-trust to pay over to him the rents, or profits &c. The practice of granting uses had Estates (as has been observed in the preceding lectures) arose from the frequent forfeitures of Estates during the civil wars which convulsed England. The owners of lands would convey them to obscure persons to the use of themselves or their friends to save them from forfeiture. The practice had alone with it great confusion & immense inconvenience which induced the enaction of the Statute of Uses, declaring that the man to whose use the lands were given, should not only have the use but the possession, not the beneficial, but the legal interest. — A fee simple was vested in the cestui que use.

But suppose an Estate devised to B for the use of C. would this Statute operate upon it? It certainly would operate to vest both the title and possession in C. the use man. — In those States however where the Statute of uses has no force this would not be the case. If then this Statute acts upon

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the roots all such Estates as these, given in trust, how happens it that in those Countries where this very Statute operates, that there are so many trust estates? How is this Statute evaded, for certainly it must be if trust Estates are allowed? It was directed by conveying by parties in the full conveyance. As where A gives an Estate to B for the use of C in trust for D the latter of whom was to be provided by the grant. And this practice has introduced the whole doctrine of trust Estates.—

Should a man then attempt to create a trust estate by a devise to B for the use of C. the Statute would cut it off as quick as lightning. In Count. where the Statute of Uses is received naught of another Statute, this would constitute a good trust estate 2 L. Ray 873. 1 Vern. 79. 167.

Thus has been a most useful Statute entirely evaded, but it is justice to observe that Courts of Chancery have so wisely regulated trust Estates that little danger need ever be apprehended from them.—

Devises.

Property devisable under the Statute of Devises.

It is apparent from the English Statute that no property is devisable in England except Estate held in fee simple. But to enable a man to devise, it is not necessary that he should be in actual possession, for a man may devise his remainder in fee. So a reversioner may devise his reversion. But a man in order to devise must be seized. The fact is, that in case of a reversion, the seizin of the reversioner is tenant or lessee, is his seizin. So of the remainder man.

But if a man is actually dispossessed is turned out of possession, he cannot devise the premises of which he is so dispossessed.

A man may devise all possible contingent interest, in the nature of a fee simple.

An Estate in pur autre tenant cannot be devised: Neither can an estate tail, nor an Estate for the life of the Testator, or to be enjoyed by the Testator for the life of another.

In Comm.t all persons may devise any estate of which they are possessed, except Estates tail. A joint tenancy may be devised here. A man need not be seized here to enable him to devise.

Devises.—

How a Devise may become Inoperative.—

One way in which a devise may become inoperative, has already been largely treated of, & which will not be taken up again. I refer here to Revocations.—

1. First then a Will may become inoperative by being revoked.

2. A will may become inoperative by reason of its uncertainty. As where a devise is in these words "to the right heirs of my name & posterity, past and past a like". Also "all my free hold to my wife for 5 years," & in a codicil made afterwards "if my estate is out of freehold before the 5 years are expired then to B &c. Also a devise "to the two best men of White house". So also "to the poorest man in Derby". So also "to one of the sons of John Stiles" he having several. In all these cases the Will is unintelligible upon the face of it & is inoperative, because when taken together no rational interpretation can be given to it.—

But a will may become inoperative by uncertainty which arises dehors the will.— as where a man gives an Estate to his son John, having 2 sons of that name.— Now we have already seen that parol proof may be admitted to identify the person, & thereby explain the testators intention. But suppose no evidence can be produced explanatory of his intention? The will in such case must be inoperative.

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3. A devise may also become inoperative when the manifest intention of the testator, is contrary to the policy of the law, or opposed to it. — Cases of this kind have occurred very frequently. — As a devise by A to B & his heirs forever, that B shall not have power to alien the estate. It is a principal ingredient in a fee simple, that the owner have power to alien; the intention of the testator is therefore contrary to law. — It will be recollected however that this by no means renders the will void. It will only initiate the clog thrown upon the Estate which is contrary to the law. The devisee will completely take a fee simple. —

So also a devise of an Estate to A & his heirs male forever, will be an intention to create such an Estate as the law knows nothing of. To have devised to the heirs male of the body of A. would have been a legal intention, for then an Estate tail would have been created. As the case is stated a fee simple would vest in the devisee. —

It would also be the same if a man should devise an Estate tail to A & the heirs of his body the prohibiting him ~~to do~~ from barring such Estate by fine or common recovery. —

So also in case of a devise from one generation to another. —

Devises.

or also where there is a Devise of an Estate free from dower. These cases are opposed to legal policy.

4. Another set of cases, which formerly occurred, of which will be mentioned now for the sake of regularity as opposed to legal policy - are where testators having several children devised all their Estates to their eldest sons, who would have taken as heirs. — It formerly made a great difference whether in such a case would take as devisee or heir, for in the latter case the property would have been liable for debts; in the former it would not. - But now in either case or in all cases the property will be liable for the testators debts.

The specific legacy, however, is not liable for the payment of debts, until the personal property descended to the heir is first applied. But the personal property of the devisee & of the heir is liable, before the real property of either. —

5. A devise may become inoperative by the devisee's waving it, which he may always do. — This will very frequently be the case, where the legacies or debts will amount to more than the property devised. In such cases devisees will not burden themselves for nothing. —

6. A devisor may have done the very thing in his lifetime which he devised to have done at the expense of his property after his death, which will always satisfy the Will and render it as to that inoperative. — As where a man

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makes a Will and gives £400. out of his personal property to his son, for the purpose of building him an house, the remainder of his Estate to his other children. The testator does not die so soon as expected, and so builds the house for his son during his life-time, & then dies. This is a satisfaction pro tanto. — 1 Eden. 95.

7. Devise may be defeated or become inoperative by a statute which subject the lands devised to the payment of debts.

Who may devise

All persons were incapable of devising real property before the Statute of Wills 32 Hen 8th except those who lived in parts where there were special customs. Before this Statute every person could devise personal property. The Statutes of Hen of Charles gave a power to all persons to devise real property, except Infants Idiots & persons of non sane memory. These it seems were incapable of devising personal property at Com. law before the Statutes

Femes Covert had also a positive disqualification at Com. law by the Statute of Hen 8th.

1. Minors or Infants are prohibited on the ground of a want of discretion. —

2 & 3. Idiots & persons of non sane memory are also disqualified on

Dowsls.

the ground of incapacity, or want of discretion to direct the course in which their property shall go — Whether persons have sufficient capacity is to be investigated by the production of evidence & to be left to the determination of the triers. A man is not to be excluded on the ground of Idiocy or Insanity merely upon the belief or suggestion of one man. The Court or Jury being the triers must judge for themselves. —

If a man has capacity to take due & proper care of his property & affairs & to manage them with ordinary discretion, he is not a subject of disqualification within the Statute. However a man to enable him to devise, must not only be capable of answering familiar questions, but he must be of a sound disposing mind.

— As to the power of a Feme Covert to devise

Femes Covert are positively disqualified to devise by the Statute of Hen 8th. notwithstanding some contend that their disqualification arises from an incapacity to devise at Com Law. But can femes Covert devise in those States where this Statute has not been adopted, is the great question? In Connt. it has been determined that they can devise property which they have to their sole & separate use without the consent of the husband, & I believe considers determined correctly. —

It was first determined in the Court of Probate in the

Davis

affirmative. It was then taken to the Supr. Court of there determined in the negative. — Thence to the Supreme Court of Errors where it was determined in the affirmative. And upon application to the Legislature to have another trial, it was refused to be granted. — In the council there was but one dissenting voice.

This to be sure was a novel question, & the principle determined condemned in lawyers generally, upon the ground that femes covert are under the control & tuition of their husbands. Hence it is inferred that they alone can sons valid act. Now if the determination is correct in Conn.t it is certainly correct in all the States where no positive disqualification has been interposed by Statute. If therefore becomes us to scrutinize the subject that we may become the better able to judge concerning it. —

In Conn.t there is nothing in the Statute which seems supposes incapacitates femes covert. By the words of the Statute "Infants, Idiots & persons of nonsane memory" and "all others legally incapable" are disqualified. Does this Statute include or operate upon femes covert? — Is coverture a legal disqualification? — If they were intended by the legislature at the time of making the Statute, why were they not named, nothing could have been easier than this. If no other persons except those mentioned are legally incapable, then no others are incapacitated and these words "all others legally incapable" are mere words of a redundant caution. There are to be some persons under disability or the

absolute control of others, as persons under overseers who could not devise. but femes covert are certainly not excluded under this ~~Maland's clause~~. —

Having attempted to shew that the statute of Conn. does not either literally or virtually exclude or disqualify married women, the question remaining is, could femes covert devise their personal property at common law, for then no one could devise real property? If in England by the common law they could devise personal property, it is agreed on all hands that they can devise real property here; for one statute regulates both. —

If there can be a single case, so circumstanced that a married woman can devise her personal property (I mean in her own right) without infringing in the least with the marital rights, or with the husbands legal rights, then we can see no obstacle to prevent her devising such property. — ~~If~~ devising she would in such a case affect her husbands marital or legal rights, it is agreed that she cannot devise. —

But let me ask if she has property to be sole & separate use, where has the Common law restrained her devising it? Why should the husband have control over it when it can never possibly go to him. Why are her wishes not to be gratified as well as his when it will not injure him or affect his marital or legal rights in any remote possible degree? —

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But these are only arguments which if against law, must yield however humble, or convenient. But is this the case?

1. The opponents of this determination in Cann.t say the wife cannot contract or devise alone, because she & her husband are one. This is ridiculous, for if they are one, how comes it to pass that the husband can contract, devise &c without the concurrence of the wife?

2. It is also said that the wife has no will of her own. This is not true in any sense. If she has no will why is it necessary that she should join the husband to convey a fee simple? Her assent must be had to pass her life estate. So her assent is wanting to pass the fee simple. Besides when the wife is guilty of an offence, is not she as subject to be punished as even her husband? Most certainly.

3. The opponents of the principle refer to the cases in the books, wherein it is said that the will of a married woman is good with the will or assent of her husband. Therefore say they it is not be good without his assent. The answer to this is ready. All these cases, without a solitary exception are where the wife willed away the property of the husband, which do not at all reach the case of a will of her own property.

4. In Reeves history of the English law there is a note cited from Bracton saying that femes covert cannot generally devise. The meaning of Bracton is obvious.

cannot generally devise, because they have not generally property to their sole & separate use.

Both Lyndewood & Archbishop Stratford think it strange that there should be a question with respect to a feme covert's having power to devise her separate property. Lyndew. 170.

5. It was anciently a practice to endow ad ostium ecclesiae with personal property, & Lyndewood maintains that the wife could devise this property. These cases stretching into antiquity shew beyond a doubt what was then considered as law by men of eminence. —

6. Before the Statute of Car 2 which Statute makes the husband administrator of the wife, & therefore gives him her choses in action for the payment of her debts. Before this Statute if the wife had choses in action never meddled with, collected, or reduced to possession by the husband during coverture, she could devise them. Her incapacity to do this arises from an incapacity introduced by the Statute abovementioned. — If this is correct she may devise as Executrix property which she holds in autre droit as Ex.x. distinct from her husband. It has been so determined. —

The numberless cases of separate property which continually arise, in Reeves opinion unequivocally decide the question.

In every book it is found that a feme covert may do what she pleases with her separate property. Why then may she not devise it

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A. J. — She cannot in England because of the positive disqualification ~~of~~ by the Statute of Eliz. & not because an incapacity arises from coverture. If coverture disqualified her then she would not be at liberty to sell or convey her property which we find she continually does under the protection of the law: and without affecting the husbands marital rights. —

[illegible] property [illegible] her must be subject to the husbands [illegible] & so vice versa, he to her power.

[illegible] femes covert not devise in those states which have intervened no disqualification by Statute? The only special reason against the [illegible] femes covert are under the coercion and control of their husbands; & even this reason upon a right examination vanished into smoke. — For if this argument proves any thing it proves too much. Were this reason to have its full latitude, then femes covert would be incapacitated to convey their separate property which they do every day. For surely this coercion would operate in sales & conveyances as well as devises. If it vitiates one, it would vitiate the other. If it is said that when women devise they are generally weak in body & mind & therefore are subject to coercion, the answer is at hand. — This does not apply to their power to devise; but strikes at the origin & validity of, admitting death bed dispositions.

The question is can femes covert devise when well in health

6 Dallas

have they the power then? Yes says J. R. —

This is indeed a

nalous to the law respecting the power of femes covert to contract. If a husband is exiled or banished, the wife can certainly contract. The ground on which the husband ever joins the wife in the disposal of her property, is unpaintly to give up his own right, and not hers.

But say the opponents of this principle of the wife may devise against the will of their husbands, why may they not convey against their wills? There is no Statute disqualifying them from conveying. — The fact is that by thus conveying she would against his will deprive him of the usufruct of her property, during life, which he has an indisputable right to, & a privation of which would affect his marital rights. —

Besides, it would contradict a settled maxim that a freehold cannot be made to commence in futuro which would be the case if her conveyance should have validity without his assent. She could not be permitted to create a remainder because it would contradict and the maxim of the English law, that the remainder must commence at the time of creating the particular Estate, which is said to support it. —

The Com. law then does not disqualify femes covert to devise, they have power so to do in all the States, where they are not disqualified by Statute. —

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There is one argument in favor of this principle which I recollect forgot to notice before, but will now mention it.

It is a principle in England that the person devising must have power to devise at the time of making the will, or it will never be afterwards valid. As where a married woman devises & afterwards being discovert, republishes the devise; now she being incapacitated at the inception of the Will, her discoverture will not render it valid.

There was anciently a practice in England that where men had good house wives they would set apart for them a portion of personal property called their rationabiles partes which they were permitted to devise, & such will was good. Now this was not because coverture was a disqualification, for if it had been the concurrence or assent of the husband could not have made a will good, which in its inception was void.

The custom of devising was retained after the Norman "conquest" within certain local limits in England, & wherever we find this to be the case married women could devise.

The following are some of the principal authorities with the foregoing principle:- 1 Reeves History E. L. 307. 111. 101. - 4 do 1 Ins Bracton. 60. Lyndw. 173. Year Book. 5 Hen. 6. 31 & 3 - 1 Brook. dev. 27. 34. Cro. E. 219. 376. 2 Vez. 190. 1 Brooke. 10. - 2 Vez. 75 - 1 do 35. 518. 3 Atk. 709. Pre. Ch. 205. 1 P. W. 126. - 2 do 316. 1 Ven. 245. - 2 Ven. 253 1 Mod. 211, 12 - Moore. 346. Anderson 92 Cro. Ab 608. 912. —

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Duress, Imprisonment, and Menace, are disqualifications to a man's devising. When a devison has been under any of these, the courts will go greater lengths to set aside Wills than they will deeds. —

Whenever a man is sick unto death bed, and being over importuned, to procure respite from teasing, has made a Will according to the desires of those who have importuned him, it will be set aside. — As where a woman teased her husband to favor a particular child —

The disqualifications to Devisors have been mentioned. It remains to say that all persons who are seiziee of real property legally, may devise if so minded all persons who have an equitable claim, or seizin, for it is all the seizin which such a claimant can have. —

Of Devisees or Persons to whom property is devisable.....

It is not impossible to find a man who cannot be a devisee. It is clear that all persons may, unless they are under some Statute or civil disqualification. —

A devise may be made to a person in ventre sa mere; therefore absent of devisees has nothing to do with devises. A devisee cannot however be compelled to take the property devised to him. —

Devises.

to grants the property granted vests immediately, therefore the noise made about the absent of the grantee is naught. Property devised vests instantly upon the devisors death. —

Coverture is no disqualification of a devisee. It is said the husband may agree or dissent to her taking as devisee. — It is acknowledged that he may do so during his life, but as an Estate by will may be made to commence in future, he cannot hinder her taking as devisee after his death. —

It was ones a question whether a husband could devise to his wife. It was said he could not because he ~~and~~ & she were one, & to have devised to her would have been devising to himself, which would be absurd. — But when it was considered that the Estate devised was only to commence after his death, it put an end to this Metaphysical absurdity talked about. —

A man may also grant land to his wife thro a medium — so to convey to another person, & he immediately to her. This is now the practice in Kent.

But in England the Statute of Uses has given to husbands a more direct way of conveying to their wives. — If a man convey to John Nokes, for the use of his wife, this is by the same deed one immediate conveyance to his wife.

It may be seen then that there

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is no such difference between devises & deeds, as is pretended by some. —

Aliens. It has been said that aliens cannot be devisees. It is true that aliens cannot legally hold property devised; but yet in case of a devise the interest does pass out of the devisor to the alien. — He certainly can take as devisee, tho' the property would be forfeited upon Office found, i.e. as soon as he was legally found to be an alien by the Commissioners appointed for that purpose.

Illegitimate Children. —

It has been said that illegitimate being "filii nullius" or "filii ~~nullii~~ possessor" cannot take as devisees. By the same parity of reasoning we may prove that they were never born! The fact is, they may always take by grant or devise after they have obtained a name by reputation, tho they cannot before.

Suppose a man devises to his eldest son, & his eldest son is illegitimate, would he take? No. The law presumes no illegitimacy, but that he intended his eldest son born in lawful wedlock. —

But suppose a man makes an Estate in remainder to his eldest son then unborn, whether legitimate or not, the first if illegitimate would not take having

10 Co. W529.

no name by reputation. But a devise to his illegitimate children would be good. If however he had 3 illegitimate children born & 3 unborn, the former would only take. If he should not say "to his sons" yet if to them by name, if they had obtained names by reputation, the devise would be good. —

1 Wh. 410.

An Estate cannot be either devised or granted to illegitimate children unborn. —

In a devise where an Estate is made to commence in future, it is not necessary so particularly to describe a devisee, but in deed which must vest an Estate in presenti, the grantee must be particularly described. —

Th. Cap. 82.

In a devise to ~~a~~ on his marriage a woman of a certain name, now this devise will vest the property on such marriage. —

Indevises uncertainty as to the person who is to take is by no means uncommon. As a devise to one of a certain man's children who shall first get married. —

Concerning Persons not in esse. —

A great deal has been said with respect to persons not in esse taking in deeds and wills; deeds and devises do vary in this particular, for an Estate may be devised generally to persons unborn, if not too far extended. No estate can be created by deed to vest in future except in the

Devises.—

case of contingent remainders.—

In Devise of Will.

An Estate conveyed to one in venter, a mere nullity, not to be valid unless by way of remainder. In case of death he civil law distributed the Estate alike to one in venter, a mere with others.—

Formerly a devise to one when born (verba de presenti) would be good; but to an unborn (verba de futuro) child, not so.— but now in both cases they are valid.— A disgraceful distinction.—

It is a rule that if you can collect from the Will that the testator intended a future disposition, to take effect at the childs birth, it will be a good devise — As a devise if the child should be born

Fearn. 332, 428

Devises. — An Estate may not only be given to natural persons, but to civil persons also; as Exors & heirs &c any words in the Will which will direct us to the person intended will be sufficient, altho no name be mentioned — As a devise to the Sheriff of Litchfield County to the parson of Litchfield 1st society &c. Also a devise to a man's son, he having but one. So — 8 of Children — to Exors of — 8.— These are all words of description or purchase of the devisees will so take. As a devise to the relations of A it will be good for the Statute of distributions

Devises.

1 Dez. 84. 10th 59. 61. 1 Ray 203. to determine. In what any words which describe the person understandingly will be words of purchase, provided the word heirs is not used, for the word heirs will make it an Estate tail, & is a word of limitation.

But if a man should use the word heirs unaptly or improperly, it will not be a word of limitation. As a devise to the heir male of J. S. here is an evident intention to describe a particular person, & the word

1 Ent. 334. 372. heir is a word of purchase or description. So also a devise

2 do 311. to J. S.'s heir whilst J. S. is living, it will not be a word of

Hob. 34. limitation; for "nemo est haeres viventis!" Always where the heir apparent is meant by the word heir, the devisee will take as "descriptio personae."

Alienation.

Lands anciently were not considered as capable of being enjoyed as they now are; for among the germans & other Northern Nations (from whom the whole feudal system was derived) they were never held as alienable. —

Lands were said to be holden at the pleasure of the Lord.. after some time Estates for years were conveyed, & they were received upon the condition of rendering certain services to the Lord. But something more permanent was introduced & a life Estate became alienable at the time of the Norman Conquest. Lands at this time were given for life only, & all conveyances were taken most strongly against the grantor, as they were incapable of being conveyed away for any longer time. Hence it is the doctrine arises in the books that unless you have some particular words as "heirs" for instance, it will be considered as a life Estate. and by that word alone all Estates in fee simple have been made descendible. But the restraint of alienation lasted longer, for it was not until the reign of Hen 8.th that a law was passed permitting a man to sell & dispose of the lands which he himself had purchased — and even then he could not dispose of the whole of his acquirements so as totally to deprive his heirs of

Cos Lit. 96.

Alienation.

any part of it. — If a man purchased an Estate to himself & his heirs, he could not alienate it, for the term heirs serves to shew that the Estate is descendible, it cannot be alienable. — But if a man, purchased an Estate to himself and "of his assigns" he might alien it, for the word "of his assigns" shews to some that the land is alienable. and afterwards a man seems to have been permitted to part with 1/4 part of his inheritable Estate; & by the great Charter of Hen 3 ½ was permitted to be alienated; but at length by the Statute 18th Edw. 1st called the Stat of "quia emptores" all restraints were taken off, and finally all persons except the Kings tenants in capite were at liberty to alien all or any part of their lands; and these tenants were by Stat. 1 Edw 3 permitted to alienate on paying a fine to the King. And by Stat. 12 Car 2d all tenures were abolished. During this period lands were not subject to debts. — No. not until the 13 Edw. 1st but now by a Stat. 2nd Edw. 3 all lands may be extended by Statute Staple and Merchant.

Instead of enquiring who may alienate, it would be more proper for us to make a negative enquiry, and see who may not alienate. These are persons whom the law has taken under some special disabilities.

H. I mean then to lay down as a general rule that all persons in possession (tho' not actually seized) may alien tho' under some special disabilities. —

Alienation.

It is true that a man out of possession can convey to a person in possession, but this is not of force to the law, but even this kind of conveyance was not allowed of at com. law. tho' it has since been allowed of by Stat. Gen. 8th which declares that no person shall convey a freehold i.e. a disputed title to any person out of possession, & adds that if they do such act it is void, and subjects the person so conveying to enormous penalties — Now there is no difference between the Statute & Com Law except the addition of penalties by the Statute. — The reason

Co Lit 369 Plow. 88. that the claimant out of possession cant convey, is that his title is adverse to the party's in possession, & it therefore becomes necessary that he should bring his action & get possession, when he will have full power to convey. —

But this action does not apply to reversions & vested remainders, for as this may be ~~[illegible]~~ — a man has a right to convey away, because the possession of the tenant in the possession of him is remainder or reversion. —

A man's possible interest may likewise be conveyed. But the contingent & possible remainders, may be devised by Will

1 P.W. 374. Sta. 132. Fearne authors son v. St. It has never been determined that they may be aliened by deed. Wadeson is of opinion that they can, & Fearne coincides with him in opinion. —

III. — Under what rates. According to the English law, a

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sons attainted of felony & treason are incapacitated from conveying, & these crimes work a forfeiture of the Estate. - But in Kent we have never considered the crimes of felony as working a forfeiture or as preventing the person so attainted from alienating. - And if we adopt the Kent law principle it works a forfeiture only from the time of conviction. We have a Stat. in Kent which makes a man guilty of manslaughter forfeit his Estate. Mr. Preeve thinks it very unreasonable that in a State of society like ours that the land should be forfeited, & thereby deprive the innocent children of their support, & expectations.

III One entire deed, which I've usually taken notice of, under the head of Contracts, I'll Preeve should be notice here. That is a Non cantor. - If a noncompos makes a conveyance it is voidable tho' not absolutely void; for after the death of the conveyancer, the heirs may avoid it, he himself cannot. But there was a time in the reign of Edw. 3rd. when non compos was a sufficient plea to avoid a mere non bond. -

6 W.R. 398.
4 Co. 123.
6 Co. 15.

There was a case grew up in which it was contended that a man should not be permitted to stultify himself, as it would thus open a door for fraud & corruption, & Pawel concurred the Court of opinion to be that persons so circumstanced shall

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not be permitted when they recover their intellects, to take advantage of their own incapacity. —

But altho they can't come into a court of law & plead an immediate deprivation of reason, yet as the King is the guardian of all ~~Infants~~ Lunatics &c they may be his Chancellor mean their suits, & this too even in the life time of the alienors.

So in the case of "officio found" a scire facias may be issued in the name of the King against the grantee of the non compos, requiring him to show cause why he holds the property. —

IV. Minors under the age of 21 are capable of receiving conveyances as grantees; but they cannot alien as their conveyances are either void or voidable. The late cases consider them as voidable: this is the privilege of the minor to consider them voidable.

V. Coverture. If a feme covert should be a purchaser, or a grant or conveyance be made to her, the husband by dissenting may destroy the conveyance - but Chancery will interpose & see justice done her. —

But if she purchases, & her husband consents it binds him, and altho his consent be necessary, yet after his death she may dissent from it, as she may have been under the control & coercion of her husband. —

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She may after coverture avoid all her contracts except a conveyance by fine & recovery. - Here she is bound unless the husband destroys it - for this he may do as it affects his marital rights, unless he be joined in the fine. - but she is bound ~~all~~ whether ~~she~~ join or not, - this is a solitary exception to the general rule, that the wife is not absolutely bound by her contracts during coverture. The ground is not as Powel says, that she is considered as a feme sole. This is law in Conn.t as well as in England. —

1 Co. Rep. 334

VI. The case of alien born is somewhat peculiar. - For he may purchase any thing; but after purchase he can hold nothing; except a lease for years of a house ~~for convenien~~ convenience of merchandise, in case he be an alien friend.

V

Of Alienation by Deed.

Alienation originally took place by the Com. law without the aid of written instruments. but it is otherwise now. There can be no contract whatever or conveyance relative to lands since the Statute of Frauds & Perjuries unless it be in writing. —

Conveying of land originally by the common law was effected by the parties going upon the land in presence of Witnesses, & there making livery of seizin, which was done by taking up a piece of turf & turf, & delivering it over into the hands of the purchaser. —

There is a difference between a writing about land to convey, & an absolute deed; for an executory agreement need not be sealed, but a deed always must be otherwise it is void.

There is a certain species of property that never can be conveyed by livery of seizin, but always by deed, & these are incorporeal hereditaments, such as rents, tithes &c When wills were first introduced, sealing was not necessary, the bare subscribing of the witnesses being deemed sufficient to prove the authenticity of the instrument. —

But now there is no such thing as alienation of

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lands even upon Com. law principles, by any other instruments short of a deed. —

A deed may be defined to be a written instrument sealed & delivered by the parties. & the delivery of this instrument conveys as absolute a property in the land, as the delivery of a horse to a bona fide purchaser. —

It is said that a deed

6 Lit. 229. must be written on paper or parchment; J Reeve conceives that a deed upon Bark, or other similar substance would be good. —

As to the subject of considerations, J Reeve will omit it generally for the purpose of taking up one particular branch of it, as he has treated upon it fully ~~upon~~ it in his essay on the subject. —

The branch of fraudulent conveyance the Judge will now attend to. — As where a deed is made by one man to another with a view of cheating his creditors of their just debts: this will be deemed a fraudulent Conveyance. (of the grantee is knowing to the design of the grantor.) whether it be a bona fide purchase or not; for the enquiry in such case is not whether there was a bona fide or indeed any consideration, for it makes no difference, as the consideration itself is never gone into, but merely what the views of the grantor were in dis-

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hoping of the Land. If A conveys a farm to B without consideration, the law considers B as holding this property in private trust for A, & if it is an honest trust it will never be objected to — but where the conveyance is made to defraud creditors of their just claims it will be a fraudulent one as was before observed. — the law looks not into the consideration (for the grant is good as between the grantor & grantee) but merely into the effect which it has upon creditors

creditors therefore may sue the grantor, take out Execution, & levy upon the lands in the hands of the fraudulent grantee. —

If there is a partial consideration only & the object of the residue is merely to defeat the creditors of their claims, the conveyance will be fraudulent as to the whole and of no validity; for the grantee might have taken a mortgage of the land if he was unable to pay the whole of it, & in that way secured himself & let in the creditors

There is such a thing as a fraudulent conveyance even altho there has been a full consideration paid. & this proceeds upon the ground that the grant is to benefit the grantor at the expence of his creditors — but the grantee must be knowing to the intention of the grantor. as where a man sold his farm and was going off without satisfying the claims of his creditors.

2 Bo. Swines case.

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It is no matter what shape the case finds one, if the grantor retains the land with the view of screening it from the hands of the grantors creditors - as in the case of a partial consideration for instance.

So where the grantor was indebted to the grantee to the full amount of the land, but conveyed it to him not with a view of its going in satisfaction of the debt, but merely to defeat his creditors. —

And so if there

vol. 4. p. 54. is a full price given, if the object is to defeat the grantors creditors, it is fraudulent. —

The statute of 27 Eliz. against fraudulent conveyance, is very frequently resorted to by our courts (and it is actually adopted by many of the states) it being in affirmance of the common law.

It has been always observed that the grantor as between himself & the fraudulent grantee, lodges his title by the fraudulent conveyance. —

But tho' the grantor cannot recover his lands, may he not recover its value from the fraudulent grantee? This is questio vexata. If the whole design of the law is to bear hard upon the grantor, he certainly cannot. But the law proceeds upon the principle that the grantor shall be estopped by his own deed

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from questioning the validity of the conveyance & that the bargain is a binding one between the parties, it would seem that the grantee ought to give a quid pro quo if that the value may be recovered from him.

But the late decision of the Supreme Court in the case of Brace vs Gatlin, it seems to be the opinion of the Court that the value of the land cannot be recovered by an action brot. by the grantor against his fraudulent grantee. still however it is questio indeterminatum. It is now settled that an actual fraudulent conveyance is void as against both subsequent & prior creditors. But a mere voluntary conveyance with no intention to defraud is void only as to prior creditors. This distinction runs thro the whole doctrine of conveyances.

The Statute of Eliz. further provides, that all fraudulent conveyances shall be void as against the party or parties for whose benefit the conveyance is made. and as against their heirs Executors & assigns.

But can a bona fide purchaser of the fraudulent grantee hold against the fraudulent grantors creditors? Some contend he claims as the bona fide purchaser of the grantors creditors & cut in point of Equity. But notwithstanding he is still of opinion that it would not be good in the hands of the bona fide purchaser. But his opposes

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can could not. If the fraudulent grantor have conveyed this land to B the bona fide purchaser he having no knowledge of A's views. — The ques: he certainly could. well then, then says, if A can convey the land away, B the fraudulent grantee can do it, for he stands in the shoes of the grantor. But Chancellor says no: the fallacy lies in this: that the law in protecting creditors does not mean that the grantor shall never be allowed to convey, but that he shall get a quid pro quo; if he sells at fair price to a bona fide purchaser he gets this, and is thereby enabled to meet the claims of his creditors (who may obtain satisfaction either by attaching his property or person) but if B was permitted to convey, B's fund would not be increased, but on the contrary diminished, & in this way actually defeat the creditors. — Further if the bona fide purchaser was sold, it would defeat the whole operation of the law upon the subject — but the maxim here applies "prior est in tempore potior est in jure" & the creditors having the first claim & of equal equity with the purchaser, they ought to be allowed to claim the land, or recover its value in money. The only way to come at the money would be to sue the fraudulent grantee for money had and received — That the fraudulent grantee, if called upon ought to refund is reasonable but that the creditors of the grantor should be compelled to call upon

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on him appears extremely unreasonable, as the grantee may be a bankrupt &c. —

One ~~question~~ ~~to~~ case has been made a question whether a conveyance may not be made with a view to defraud creditors in any case whatever which will be valid. — The question then seems to be, whether property can be so conveyed as to screen, when other real property is left sufficient to meet the claims of his creditors. — Here it seems not to be made fraudulently, for it does not deprive the creditors of their security. — & if it be made reasonably & bona fide questions whether it would be considered as a fraudulent conveyance.

Another question. — May there not be cases where a mere voluntary conveyance made with no intention to defraud, be valid as against both prior & subsequent creditors

Frost vs Hampard

& there answers this question in the affirmative: & put a very striking case which happened in his own practice elucidating his opinion — Mrs Hampard was the wife of a young gentleman of large fortune, exceedingly dissipated, but subject to occasional paroxisms of rheumatism; — In one of these intervals of ~~rest~~ consumption, finding his estate rapidly wasting he made a conveyance to a person who conveyed it to his Wife of a small Estate amounting in value to about £800. After a lapse of 10 or 12 years his whole fortune was expended. The creditors saw the rapid diminution of Hampards fortune

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fully, but took no measures to secure their demands: & afterwards were precluded from coming upon his Estate, upon the ground of their negligence. This was decided by the Sup.r Court. —

The alienation of voluntary conveyances is not grounded upon Statute, nor upon any other maxim of the common law than this: "That a man must be just ere he is generous." —

Cowp. 434. 705. 3 Wils 356.

Covenants in deeds that are not quit claims or releases, are usually of two kinds. 1. Covenant of Seizin. — 2 Covenant of Warranty. —

In all deeds (except quit claims) the grantor 1. covenants that he is well seized of the premises & 2 Warrants and defends them against all claims whatsoever.

Whenever a man seized sells a farm, not owning it, you may bring your action on the covenant, for the covenant of seizin is broken as soon as made — & the action is sustainable on the ground that the money was paid without a consideration. —

If there has been a breach of the covenant of Warranty, you cannot bring your action on the breach, until after being evicted & turned out of possession.

The ordinary mode of proceeding is, when B sue D claiming under A, for A to give notice to the covenantor — A, who sold & warranted the land, by a writ of notitia

tion called a "voucher." This being done, it is at his option to appear or not & make defence in support of the title vested in B. But if B is evicted he may sue S on his covenant of Warranty. —

The damages to be recovered in Covnts are always equal to the full value of the land at the time of eviction — But in England the damages to be recovered by the grantee are merely what he gave for the land and the interest arising from it, with the emblements & not the rise i.e. its value at the time of eviction. —

Suppose B now sued in ✓ b & was evicted by C. can he recover of S in an action on the covenant of Warranty? This is not conclusive as against S, if B can do no more than move for a new trial on the evidence ~~of~~ furnished by S, & in this case B loses his cost. but if B had given notice to S & then S had neglected to appear, B may have his action on the covenant of Warranty. —

It has been a question greatly agitated in England, whether written notice is necessary to preach in the covenantor? J.R. seems to think that if it can be proved that the seller had actual personal notice it will be sufficient; but the safer way is to give written notice, in which case the re-

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[illegible] conclusive, if the covenantee as soon as he is evicted can bring his action on the warranty against the covenantor.

These covenants of warranty may be availed of, not only by the parties entering into them, but likewise by their heirs or assignees.

If the covenantee dies a deed dies, if there has been a breach of the covenant of Warranty by a stranger, by the Covenantor, who is entitled to the action? is it the heir or Exr. of the covenantee? the rule is this: that in every covenant real, if the covenant be broken during the life-time of the Covenantee, so that he would have been entitled to damages when he died, it will go to the Exr. and this upon the ground that damages have already accrued, being of a personal nature, going to the Exr. — But if the covenant runs with the land, as if it is not broken in the lifetime of the Covenantee the right of action goes to the heir upon the Covenant of warranty entered into by his ancestor.

Again, suppose a man owning land should lease it, & the lessee should covenant to repair the House upon it, but should break this covenant in the life-time of the lessor so that damages had accrued at the time of his death. Who in this case the right of action would rest in the Exr. upon the principle of damages being of a personal nature. —

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But suppose the lessee should covenant to build an house within seven years, & before the time elapsed, the lessor should die: why in this case the land descends to the heir. If the lessee neglects to fulfill his covenant, the heir may have an action on the covenant with his ancestor. But if the covenantor sells the land & the breach is committed after the sale is made, the assignee may have his action on the covenant against the covenantee. & the same rule will apply to the assignee of the lessee. —

Lev 26. 92
5 Co. 18.
1 Vent 175

This doctrine may be further elucidated by attending to the covenants between the lessor & lessee — When the Lessee makes a covenant that does not run with the land, the assignee of the lessee is not bound; but in all cases where the covenant runs with the land the assignee is bound & this not on the ground of any privity of contract raised between him & the lessor, but because he takes the Land "cum onere". —

All covenants unbroken that run with the land descend to the heir on the death of the ancestor.

If the covenant respects a thing in esse & is conversant about the land leased it is a covenant that runs with the Land. —

But if B the lessee covenants with A the lessor to repair a certain house standing on the land, within a limited

Co Lit 46 7.

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Suppose the time has elapsed & assigns over this lease to C. It will
1 Lev. 109 be obligatory on the assignee, for the covenant runs with the
5 Co. 24. land, & every person who takes the lease being assignee lays himself under obligations to repair the house, for the assignee must take it "cum onere".

Again: suppose B the lessee covenants to pay A the lessor £20 pr year for 40 years, & soon after covenanting sells the lease to C. C is bound to pay the £20 annually for the length of time that he shall be in possession of the land — & if after a few years C should convey this lease over to D, D is under the same obligations, for the land is only shifted ~~on~~ on to the shoulders of another person. — An the assignees in these cases is not liable by virtue of any privity of contract entered into between him & the lessor — but merely because he takes the lease cum onere the covenant running with the land. —

Again: [illegible] assigns & names, & the bove-
Co. 15. nant is covenant about the lands [illegible] for the man-
3 Bun 1271. nance of a [illegible] house, but [illegible] something de novo it will bind the assignees, as the covenant runs with the land. [illegible] assigns, & unless the case is otherwise. — As the covenant is to build a house, [illegible] the assignees will be bound if [illegible], otherwise if not. —

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But if the covenant be to scour a ditch, repair a house, build
Co. 15. a wall, or do any act relating a thing in esse, the assignee
3 Burr 1271. will be bound whether the word assigns is mentioned or not,
if the thing to be done is on the land, otherwise not.—

If the time limited in which the thing is to be done
1 Salk. 199. has expired before the assignment of the lease, the assignee
2 Ray 338. will not be bound.—

But when the covenant by the lessee with
Co. 4 68. the lessor is to do a thing which is entirely collateral, to the land
125. the assignees will not be bound tho' named — as where B
Cro. 221. covenanted with A to build a house on a piece of land different from that which was leased to him, it will not be binding on his assignee, for the covenant does not run with the land.

The lessee in all the preceding cases (with the exceptions mentioned) is notwithstanding his assignment liable, the assignee being nothing more than an additional security to the lessor.

It was formerly a question whether the acceptance of rent from the assignee did not discharge the lessee. It was decided that it did not; for it is no waiver of the claim against the lessee, the assignee is only liable on the principle of enjoyment.

But if the assignee assign to a 2 assignee,

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he is discharged from his liability to the lessor, but not to his assignor, in case of an insufficiency in his assurance. —

But if the lessor

Coll. 522
527; assigns, his assignee is entitled to the benefit of the covenant in
Cro. E. 309.
521. the same degree that the lessor himself would be entitled to
3 Lev. 233 it. — 1 Salk. 81. Carth. 177.

The assignee of a lease has the same
5 Co. 17. right to sue the lessor for a breach of covenant as the lessee
himself, not by privity of contract however between him
~~Moore 24~~ and the lessor, but by the benefit of the covenants running
Moore 242. with the land. —

These cases suppose the Exr. or heir to be
Defts. — But suppose the Covenantor dies, who is to be
sued, the heir, or Exr.? — It is a general principle of the
English law, that the Exr. is always liable to be sued for the personal contracts of his testator, & the heir real also, where there is a right of damages incurred by him in his lifetime.

The ~~Exr.~~ heir is bound by all contracts, whether real or personal, when the ancestor binds himself by specialty, to the extent of his assets. — But yet it is not so in Coun. for here the Exr. may discharge not only of the personal, but when that is exhausted may come upon the real property to discharge the debts of the creditors. — The heir of course is not liable except in some exempt cases in chancery, for

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is presumed to have received nothing from his ancestor. —

It may be that a real covenant is entered into, which has not been broken in the life-time of the covenantor, but afterwards by the heir; here the heir is liable if not the Exr. for the lands have descended into his hands if the breach is committed by him. The rule is the same if there is an assignment made.

There is a certain species of conveyance unknown to the English law called quit claim deeds. These deeds contain no covenants whatever, but are mere transfers of the grantors claim to the property in question. This species of conveyance raises a very important question; which is; whether the purchaser under a quit claim deed for a valuable consideration can, on there turning out to be no title in him, recover back the money paid to the grantor? The true distinction to be taken in all the cases Chancellor Reeve apprehends to be this: that where A gives a quit claim deed to B, the latter paying a valuable consideration knowing it to be a bargain of hazard if it turns out that he has no title, that the purchaser shall not be permitted to recover back his money, for the bargain was made at his own risque. —

But a quit claim deed is given both parties supposing it to be a good conveyance, if it turns out to be the contrary, the grantee shall be permitted to recover

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back the money paid.

A deed may have a Condition to it, which will defeat the operation of it entirely, as in all mortgage deeds.— For if A convey a farm of land to B with this condition; that if he pay a certain sum of money within a limited time, the conveyance is to be void; if not, it is to rest absolutely in B: now if A pays the money within the time agreed upon, the deed is defeated. & this payment is to be proved by parol evidence.—

A date is commonly a date to a deed, which is the apparent time of its delivery — for the presumption always is, that the deed was executed & delivered at the time of its date. but this is by no means conclusive. — of the maxim that parol proof cannot be admitted to contradict a written instrument does not apply here, for the delivery is in a state of being proved by any other than parol proof.

But if there is no apparent date to a deed, & you can make out its delivery, it will be good. for it is from that time that all deeds begin to operate. — A case came before our superior Court where a bond was dated the 1. Jan. 1774. when in fact it ought to have been 1775. parol proof was admitted to shew the time when it was actually signed

6 Co. Lit. 46.

— another requisite to a deed is, that it must be read

8 Co. 3. 9.
11 Co. 28. This is not strictly true; for it is not necessary unless dame

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of the parties require it, & if not then done the deed is void as
2 Rol. 28. to them. It must be read to blind & illiterate persons, & if
it be read falsely it will be void, at least so much as is
misrecited; unless it be agreed by collusion that the deed
shall be read false for the purpose of making it void. &
2 Bl. 308. in such cases it shall bind the fraudulent party. —

Another requisite to a deed is that it must be sealed. This is agreeable to the English law; & signing is supposed by Blackstone to be necessary. —

Another requisite to a deed is, that it must be delivered, or it is not good. And the proof of the delivery depends entirely upon parol evidence. But the question here arises what is evidence of a delivery? subscribing witnesses usually attest to the mere corporal act of sealing, & not the delivery, for they cannot be relied upon as proper witnesses, but persons who were present at the time of delivery are to be obtained if any such there are. — Words without any act whatever is a good delivery — as where one man says to another, "There is my deed lying upon the table, take it.

In many instances there are no witnesses present, at the delivery of the deed: this has reduced the party to the lowest kind of evidence viz the possession of the deed. which is prima facie

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evidence of its having been a legal delivery, but this presumption may be rebutted. The mere circumstance of the grantee's being in possession would not of itself furnish very strong evidence of the legal delivery. But the deed being sealed & executed presupposes a consent on the part of the grantor, & carries violent presumptions against him. —

There is such a thing as

2 Roll 25. a deed being delivered as an Escrow. This is giving the deed to a 3 person to hold for the use of another, until the happening of some particular event, on the happening of which the deed must be given up: or it is the delivery of a deed to a 3 person to hold until the performance of some condition by the grantee. — The deed in both these cases is delivered as an Escrow & upon the happening of the event or performance of the condition, becomes a deed to all intents & purposes.

This deed held in trust as an Escrow, may possibly be delivered upon the mistake supposing the event to have happened, in which case the delivery will be of no effect — but this mistake must be proved by proper evidence. —

Co. E. 835. 1 Mor 697. It has been a great question whether ~~the~~ a deed as an escrow can be delivered to the grantee himself to take effect

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The rule of law, there considered to be this: that if the deed is delivered in the grantor's name to become his act and deed on the happening of some future event, it will be as good as a deed vesting instantly, the condition therefore is void & it cannot create an escrow.

Cro. Eliz. 521. 584

Hob. 642.

If deed once delivered, an event be defeated by a condition subsequent. but to have this effect it must always be a condition precedent.

There are certain technical rules with respect to a certain set of cases, which seldom happen, but which the Civil will not pass over. These are cases of this kind. That where a deed when first delivered was not good, on account of incapacity in the grantor, as being a feme covert, but afterwards having obtained this capacity, the grantor makes a second delivery. —

And so where the grantor was incapable on account of some impediments being in this way, as being a disseisee (i.e. ousted of possession) should after removal of the impediment make a second delivery. In certain cases these second conveyances will be good, & in others not. which cases now remain to be pointed out. — As to the first cases. — Suppose a woman during coverture make delivery of a deed, and

Cro. E. 476.

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Cokit 48. after her husbands death, makes a 2 delivery: 1 is 2
56.b.35. delivery makes the deed effectual.

But suppose the feme covert wanting capacity, delivers a deed as an Escrow & after attaining capacity viz after her husbands death should make a second delivery, it would not be good.

As to the 2 case, where a person has capacity, but labors under some impediment as being out of possession: here if the disseisee makes a delivery & afterwards gets into possession, & makes a second delivery of the deed it will not be good - this is a mere positive rule of law. the Judge cannot see the reason of it. - But suppose the disseisee labouring under an impediment should deliver a deed and afterwards having the impediment removed should deliver it a 2 time it would be good.

Next ceremony by our law is, that there must be two competent witnesses. Under the English law they have these, tho' they are not absolutely required.

All the requisites to an English deed are necessary to us, except sealing. but we have two additional requisites that are not common to the English deeds, viz. those of acknowledging and recording. The first is effected by going before a magistrate and ac-

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knowledging the same to be his act & deed. The 2d that it must be recorded. This is not done to benefit the immediate parties; for as between the grantor & grantee the title is good without it. It is to prevent the grantor from making other subsequent fraudulent sales of the same Land. — Upon this account the law says that if one farm of land be sold to two persons, he that gets his deed first recorded shall have the best title. —

To this rule there are two exceptions. — 1st. Every man must have reasonable time to get his deed recorded; & the Common law protects the grantee untill he has been guilty of negligence, in which case the law operates & gives him the preference who gets his deed first recorded — for "prior in tempore potior est in jure."

The 2d exception is where a man is not a bona fide purchaser. As if a man should go and purchase a farm of land which he knew was previously sold, but the purchaser had neglected to get his deed recorded — here the second grantee shall not avail himself of the legal title by getting his deed first recorded. for it would be openly encouraging a principle of fraud & collusion.

Exceptions are sometimes made in deeds. As in a conveyance where the emblements are specially reserved. or timber growing upon the land. —

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Every thing adhering to the freehold passes under a grant, unless specially excepted, but a rent is of a personal nature will not.

Also any special exception may be made unless it be of a thing certain, out of a mere certain & particular" is Cokes language. But Rent comenses the rule to be properly foolish. —

6 Co Lit. 47.
4 Mod. 12.
1 Show 311.
Cro E. 522.
2 Rol. 454.

How deeds may be avoided.

A semblance of a deed i.e. one wanting some of the requisites may be avoided either in Chancery or at law.

Thus if it wants witnesses under our law it will be void.

— A deed may also be avoided having all the requisites, as by razure or alteration. Razure is erased it is not the act of deed of the obligor.

If an obligee alter it in a place material, or immaterial it may be avoided, even if the alteration is in favor of the obligee — this is grounded on policy. —

This has been somewhat relaxed in the mercantile law; but the propriety of this relaxation is doubtful. —

If the obligor alter it, the obligee ought not to be a loser, if proof may be made of the alteration.

11 Co 27, 8
Co E. 626.
800.

If a stranger alters it in a material part it vitiates it, if in an immaterial part it does not. —

Question. Suppose after the deed is executed the parties agree to alter it. This does not destroy the obligation ordinarily, if parol proof is admissible to prove the agreement. —

2 Ser. 35.
6 Co. 627.

In our deeds there is a difficulty: Suppose the subscribing witnesses are not present at the time

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of ~~attestation~~ ~~from~~ alteration; can they attest ~~the~~ instrument as altered. No. – ~~And~~ no other witnesses are admissible to prove the execution. – this may be unreasonable.

Deeds may be avoided by a tort as breaking off the seal in England. This would not be adopted at this day. – And Coke says that if the seal should be broken or lost in the custody of the Court, the benignity of the Courts is such as not to invalidate the instrument. –

Coke 6 b. 23.

Coll. Tren 40. –

Signing is always practised under the English law, tho' not required by any positive rule. –

The enrolment of the grantee deeds may be avoided. So by a decree of Chan. which is paramount to all others. –

Various kinds of Deeds.

The kinds of Deeds in use in Eng. exist under the Statute of Uses. – as

1. Feoffment, which was made without deed by livery of seizin.
2. Grants which conveyed incorporeal hereditaments:
3. Gifts, meaning conveyances of estates tail anciently

Illination.

the operative words are do or dedi.

4. Leases are properly a conveyance of any lands or tenaments made for life, for years or at Will, but always for a less time than the lessor has in the premises.

5. Partition, is when two or more joint tenants, co-parceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part.

6. Defeasance, is a deed declaring some other deed which may defeat it.

7. Release, is absolute, and ought to be understood. This vested the grantee with the title of itself. — This could never be made unless to some person in possession, having some Estate in the land. This is on the ground of lease & release.—

The Deeds now "in fashion" originate from the doctrine of Uses, & ought to be here explained.—

Of the doctrine of Uses.

Originally there was no such thing as the land being conveyed away to one person & the use to another.

About the close of the reign of Edw. 3d this was introduced into England. A question seems the men

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in contemplation of death & convey their lands to ecclesiastical bodies. By the Statute of Mortmain this was abolished, & some cunning ecclesiastics, invented to avoid it, by the doctrine of Uses, which was upheld by the Ecclesiastical Chancellors then sitting. This was sanctioned by the Legislature except when the conveyance was made to Ecclesiastical bodies, & was found very useful.—

The law of Uses & then Trust is analagous to the doctrine of trusts.— The cestuique use could always enforce his claim by applying to Chancery.

The use title descended to the heirs of the cestuique use instead of the legal title to the heirs of the trustee. They were also devisable & could be sold, tho no dower or curtesy could be had in them. This introduced jointures.— It could not be extended for debts either of the use-man or legal holder. But by Statute they were made liable, & an action could be brought against the cestuique use & his conveyances were confirmed. It could not escheat or be forfeited. Inconveniences arising from this doctrine introduced the Stat. of Uses, which united the legal & beneficial interests in the cestuique use.

Owing to technical difficulties

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this statute was nullified in effect; for a use could not be limited upon a use. If a conveyance is to ~~to~~ B for the use of C, it is good as to B, but if C held for the use of D. the courts would go no further than to C & the beneficial interest could not rest in D. This threw back the business to Chan. who declared it a trust in C for the use of D. —

Again: in the Statute of Uses the word seized was introduced. If the cestui que use must have been seized to rest the use. This applied to freeholds merely, and by under this the conveyance of Wills was given to Chancery. —

Chan. [illegible] that trusts are descendible & devisable exactly as real property. But it was not liable to dower; for [illegible] it was. But it has been decided in Conn. that it is equally liable for the former as the latter.

In Eng. a trust estate is not liable to forfeiture.

Two modes of conveyance have originated. — 1. Bargain & Sale. This was done thus: A for some consideration covenants ~~with~~ B to sell him a farm of Land. — A is considered as seized for the use of B, so that in case the land is sold & ~~the~~ B

Alienation.

is vested with the title. These deed are required to be enrolled only in some court in one of the Courts of Westm. Hall within 6 month. Inherent. It vests a fee simple.

2 R 342

2. Lease & Release. This is the most common mode. call to mind the doctrine of Release. - A leases to B this land for one year & B pays him the rent. B then is in possession under the statute, as cestui que use then. A may release to B to whom he has previously leased, & who is in possession & has an interest.

Of Injuries to Real Property.

There are many injuries to Real Property under the English law, of remedies established, which are not used in this Country. These will be omitted.

Those of importance to us are Trespass against property — Disseisin — Waste — Nuisance; & others of no particular moment, which are not immediate, but consequential injuries.

The injury of trespass is remedied by an action of Replevin or ~~amis~~. Under this head I shall consider Replevin.

The injury of Disseisin is remedied by an action of Ejectment.

The injury of Waste is remedied by an action of waste; besides a preventive remedy in Chan.

The injury of Nuisance is remedied either by removing the nuisance, or by an action on the case.

The other injuries which are consequential are remedied by actions on the case. — As where a man should put up a spout on his own house, so that the water is conveyed on to another's land, it would be a con-

sequential injury remediable by an action on the case, the same as turning water in a ditch.—

These several injuries will now be considered in their order.

1. „Trespass vi et armis.—„

Trespass in its fullest extent: not now to be considered, but merely as it relates to Real Property.

Trespass of this kind may be defined to be an entry into another mans land without permission & doing damage. It is sometimes defined to be an entry into another mans ~~lo~~ lands tenements & hereditaments; but the word lands includes all of these three. You are not to understand by this rule that a man can never enter on to another land without leave, for there are many cases in which he will be justified; as to get his own property or to pay money &c for here the law considers no injury as arising. The action will lie for every injury to another land however small, for the right of meum & tuum are still by protected.

The principal thing is the remedy. This action rests on the Pltfs possession i.e. it is necessary in order to maintain trespass, that the Pltff has possession. & there must be an invasion of his possession in order to entitle

9 Rolle 557.

Trespass

him to an action. The action of Ejectment proceeds upon the idea of the Pltff. being out of possession.

One thing here ought to be noticed: i.e. the difference between the English & our law. Under their law there must be an actual possession. Our law proceeds upon the ground of a right to possession, which will be sufficient to entitle the true owner to an action. We treat realty as they do personalty & both alike. — Ex gr. If a man dies & the heir does not take immediate possession, & there is a trespass committed in the interim, the heir by the English law can maintain no action; but with us he is presumed to be in possession from the death of the ancestor & of course entitled to his action of trespass vi et armis.

If in Comm.: another is in actual possession, then the owner out of possession cannot maintain trespass.

What kind of possession is it that will entitle a man to an action of trespass vi et armis? —

It extends to all who have any right or licence to improve the land. Every kind of Estate from a fee in fee simple fee tail, for life, for years or at will, is sufficient to entitle a man to this action. And the action lies against the lessor if he enters during the lessees term.

As it respects tenants at Will or sufferance the law is different they can maintain no action against the owner of the

land, without he invades the emblements. tho he may against all strangers. —

Even the lessee of a Pasture for one season has a right of action against all who invade his rights. —

2 Rol. 551. Co Lit. 4. Moor 302. But a mere intruding ~~into~~ possession on the having possession will not be sufficient to enable the intruder or trespasser to maintain an action. —

Co Lit. 257. If a lessee at will does that which amount to waste in a tenant for life or years, he is liable to an action of trespass. —

2 Rol. 553. Can the disseisee having the legal title bring trespass against the disseisor, for the turning him out & lyes he may, but if the disseisor continue in possession after this, he must bring his action of ejectment, & vest the possession in himself, & in the same action may recover damages if he pleases, but this is not common, for after his gaining possession, by a fiction of law, he is presumed to have been in all the while, & he may bring his action of trespass vi et armis for all damages in that he comes for all the rents & profits while the disseisor has been in possession. — But there is no need of this additional action to recover the rents & profits, for it might be done in the action

Issues.

of ejectment.—

Quæstio vexata. On this there appears a difference of opinion among the elementary writers. This is very clear viz. that a man after he has got possession may maintain ejectment. — Suppose a disseisor who claims title in possession, during which a stranger enters and cuts down timber of wood. can the disseisee on regaining possession maintain an action for damages? The difficulty is here; the disseisor can bring an action & shall the stranger be answerable to him & the disseisee? certainly not. But it is said the disseisee may sue the disseisor. Suppose he is a bankrupt shall he suffer the loss & have no remedy? — Powel ~~on~~ in his treatise on Mortgages cites 11 Co 51. & says that the disseisor cannot sue the stranger. but in 2 Rolls abr 554. it is said that the disseisee may sue any stranger. J.R. concurs with Powel in opinion. Another argument which might be used in the question is, that the disseisee might have brought his action of ejectment at any time. There seems to be principles ~~and arguments~~ enough to depend & decide the arguments on both sides of the question.

Gilb. L.E. 500.—

2 Rol. 569. If a man sells his Lands he does not sell the right

Trespass.

of action which accrued while the notefield and owned the land so that to maintain the action it is not necessary that the Pltff. was owner the land.

It is a well settled principle that if
2 Rol. 552 any person intermeddle. commits a trespass by the command of another he is liable. as a servant by the command of his master, if the person thus doing the act does not stand on the ground of one of a number of joint wrong-doers, for the servant here can call the master to account, & recover obtaining an action for wrongs committed by the master direction, by which the servant has suffered damages. for servants are not supposed to enquire into the masters right or title where the act on the face of it is lawful. If half a dozen men go together by the influence of one of the party, & altho this one who is the principal leader did the chief of the mischief, yet all the 6 or any one of them are liable — as in the case of "Clarks well house" there it is probable that not more than two or three were actually employed in its removal yet all the others who were in company & countenancing the thing were equally liable with the actual removers of it. Thus we see that this action lies against every one who aids, procures, commands or countenances a trespass.

This action of trespass lies not only against the master, servant &c for injuries done by them but also for dam

Respass

age done by their cattle in breaking into their neighbours close &c. In case of adjoining proprietors, if the cattle break thro' the Deft. part of the fence, he is liable whether the fence is good or not; for if the fence is bad he ought certainly to answer all damages & so to if the fence is good, for then certainly his creatures are unruly. But if they get thro' the Pltffs part which is not good, then the Deft. is not liable, as the injury of any is occasioned by the Pltf. own neglect. otherwise if they get thro' the good fence of the Deft. — When cattle get in from the high way, it is different. All comonable beasts (which are all neat cattle & sheep) may run in the highway according to the common law, but not to the disadvantage of any person. if therefore they break over a good fence, he stops vi et armis will lie against the owner, but not if the fence is bad — Horses nor hogs are comonorable beasts, unless by virtue of some local by laws. — Goats Mr Rees supposes would not be considered as commonable. The supreme Court in New London decided the owner of hogs was liable for damages done by them. & this was affirmed by the supreme Court of Errors. If commonable cattle break into any premises enclosure the owners are liable: the only advantage therefore of these bye laws is that the animals are not liable to be impounded while running in the highway. —

Ch. 34. The injuries in these cases in order to constitute tret-

pass must be immediate & not consequential. —

It is a rule of the English law that if a man is guilty of a tres-
2 Rol 552 pass & the same act is a felony, that you cannot bring an action
of trespass for, say they the trespass is merged in the felony.
But this doctrine appears to be very frivolous & foolish. The
true reason is that if the offender is convicted of felony, he has
forfeited his estate & therefore a recovery of damages against
him would do the Pltff. no good. But suppose he is not convicted
then may you not have your action for the trespass. Yes
unquestionably. But in Connt. where there are no forfeitures
of property there can be no objection to an action being brought
for the trespass.

There are certain cases in which the law gives
a person licence to enter on another's land: & if a man when
entering under this licence, commit a trespass he is consid
ered as a trespasser ab initio.

— But where the party injured
2 Rol. 561. gives the licence, & the person licensed commit a wrong
3 Wils 20. he cannot be considered as a trespasser ab initio — This
8 Co. 146. may be explained by a mans entering into an Inn which
the law allows & there is guilty of any injurious acts, he is a
trespasser ab initio So where one pursuing a hog dam
age feasant & killed the hog, he was a trespasser ab initio
It is generally true that a man who has been guilty of a

Trespass

~~negligence~~ negative abuse of an authority or licence given
5 Bac 161. him by law does not thereby become a trespasser ab initio, be
cause he has only been guilty of a nonfeasance. —

It has been observed that entry is in many cases justifiable. – As when one enters a house by authority of process which sometimes may be and sometimes may not be done. If an Officer has a process either civil or criminal, and he finds the outer door open he may enter and break open any inner door to execute his process. But where the door is shut it cannot be broken open for his house is considered as his castle.

The privilege of the individual always yields to the interest of the public: in all criminal cases this is the fact, therefore a criminal process justifies breaking open any door.

If it be a civil process the general rule is you cannot break open the outer door. But to this rule there are some exceptions – As where a person having been one arrested escapes, in which case he is your prisoner & you have a right to break open an outer door to retake him.

The rule must be understood with this restriction that the house is only a Castle for the protection of the inhabitants i.e. those who dwell in the house, if not a

Bishops.

stranger. The house of the master is the asylum of the servant or other person living therein. This has been long the English law & is generally recognized in this country.

The English reasons seem to be local & generally apply to large cities (as London &c in that country) to prevent thieves from breaking into houses which would be done more frequently if officers were allowed this privilege of breaking into houses & so expose the house to thieves & robbers. But the other & more general reason applies with great force to this country i.e. when an officer comes with a number of men, axes &c to tear all before him in case he is like to meet with obstruction, this would disturb the family & their peace if the outer door was permitted to be broken open.

Any attempt of a man to shut himself up in a building made for that purpose will not answer. As if a man should build a small house to conceal & protect himself, this does not come within the rule, & it will not be privileged as his Castle.

The outer door must be fastened for a mere prohibition from the owner will not be sufficient to prevent the officer from entering.

There are two cases which contain the whole of the law upon the subject. The S. is Semaine

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case in 5 Co. 93. the other in Cowper, 1. These two cases agree in every thing but this: i.e. where the Officer does break an outer door would the levy be good? In Semains Case, it was held that the breaking open of the outer door was a trespass, but the levy upon the goods was lawful. But the Case in Cowper (Gansell v Lee) was variant. Gent. Gansel hired a room in a boarding house, the Sheriff entered the outer door which was open, & then broke open the door of Gansell's room. Gansel contended that his room was his Castle, & that the door was the same as the outer door of a dwelling house but the Court considered it as an inner door, & were clearly of opinion that he was legally arrested, tho' they considered a levy after breaking the outer door as not good. — — Ind. J. C. is of opinion that any thing done in consequence of an unlawful act is void. Therefore therefore a man has been guilty of a breach of law, it is not best that he should derive any benefit under it, — as where a man is detained on the Sabbath and kept till monday, & then arrested the arrest is illegal, for no such construction ought ever to be held out that a man shall be benefited by breaking a law. Again: — If convey a farm to B & B was in possession, this was an illegal conveyance under our Statute, therefore both had incurred the pen-

Bishops.

...ity of the statute, he voided the grant being void. The grantee claimed that he ought to recover of the grantor on the covenants in the deed, but the court said that he should not derive any advantage from an act which was a breach of law.

And a stranger break open an outer door & the officer is privy to it the arrest will be an illegal one, but if the door is broken without his knowledge, & he enters the case will be otherwise.

Where a man owes me or I owe him, I may enter his house to demand payment or to tender the money i.e. I may lift the latch of an outer door to enter.

A person may enter an Inn without any express or particular license, for the law gives a general license. But the inner doors of an Inn are as much privileged, as the outer doors of other houses; the reason in this case is a security to such as are at rest there. Burns says that boarders in a tavern are protected on the ground that the peace of the lodger & traveler are not to be disturbed.

This privilege of the inner doors of a tavern is not upon the principle of protecting the debtor but lest the innocent family should be disturbed & exposed to thieves. The maxim of policy is this: That a greater

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evil should be avoided for a less, if a less should give way to a greater."—

Bulle in his Nisi Prius says one may enter & distrain the goods of tenant for rent in arrear. If the tenant has got his goods into a tavern they are sacrosanct. But if they are put into the tavern for the sole purpose of screening them, & no lodgers are there to be disturbed they probably may be distrained there.—

If the person in whom the reversion of a house is, no. prevents the door being open, to see if any waste has been done this action will not lie against him.

Turning cattle on another man's lands is admitted by the Common Law of England, provided cattle do not injure the crop growing as grass & weeds up the earth— this was permitted upon principles of policy.

When Bees are found upon another's land the law allows the finder to take them off.

Cro. Jac. 321.

J. R. thinks in this County no man would recover in an action of trespass vi et armis without making out actual damages something more than the imagination conceives of.— According to the strictness of the law the least entry is sufficient to entitle the owner to damages, tho' nominal.—

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When a kind of bees cuts a tree to get them, the practice here is to allow a compensation for the tree to the owner.

Sometimes a man is justified in entering another land to reclaim and bring away his own property. As if wind should blow away his property on ~~the~~ to his neighbors land, or my horse should happen to get on to my neighbors lot. I may enter & bring him away.—

Suppose that a man has sold me a farm in the middle of his farm. Here the law allows me a licence to cross his land to get to ~~his~~ mine. — But if by virtue of an Execution I levy upon a piece in the middle of his farm, & there was one road in Comm.t the law allows me no licence to cross his other land. & the Supreme Court in that case determined that the Creditor should purchase a road to it.

[illegible] land & entered under claim of title & he is sued by the person in possession, this title is a sufficient justification. This is one of not an uncommon mode of trying the title to land.

We have a Stat. in Comm.t on the subject of trespass on real property. The Statute alters the com. law in a variety of cases. It not only gives to the party injured a right to damages for the cutting down timber, but a right to recover a

penalty of ten shillings for every tree of a foot over, & those of greater dimensions three times their value besides 10/ each & 5/ for those under a foot & the damages recovered are treble. The Pltf. cannot recover this unless he brings his action on the Statute.—

You cannot always recover of course on the Statute, for it has been construed to include cases only where the cutting was done animo furandi. The Statute was intended to respect any wilful entering & cutting down another's timber, & not for any accidental cutting over bounds on to his neighbours land. — The Statute meant that the Trespasser must have gone on with a trespassing intention, & such acts ~~only~~ only the Statute was meant to furnish a remedy.

These penalties & treble damages are recoverable in a civil action, so that it is not considered as a crime or a public injury.

A man may be voluntary in cutting down the trees, & yet not be liable under the Stat. as where the person cutting does it under claim of title. Here the man does not go with a trespassing intention, or with a design to take the property of his neighbour but to take his own.—

Altho' you bring your action upon the Statute

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but do not make out that the Deft. trespassed voluntarily & with a trespassing intention, of this kind of recovering under the Statute, still if you can make out that the Deft. has trespassed & your declaration is sufficient a recovery may be had at Com. Law; i.e. the Pltff. recovers as if he had brought an action at Com. Law for the real damages.

Another clause where a wilful or negligent throwing or leaving down bars, gates or fences is enjoined with a fine not exceeding $5 - & a recovery of double damages. —

Stat. 422.

Another clause of the Statute is that any person shall set fire on lands, which runs on to another persons land, he shall be answerable for all damages. The Counts have said that this Statute was merely to affirm the Com. Law on the subject. By the Com. Law of Eng. it is understood that where one sets fire at an improper time & it injures his neighbour, he is liable. — I can in Count. some cases where the wind [illegible] N.E. and a man set fire & it appeared impossible but to cause injury: but if a man set fire and suddenly shifted about & the fire ran on to his neighbor's land; here the Court said the man was not to blame & therefore not liable to an

Stat. 422
422,3

action.

There is another clause in an statute which is quite
Stat. 423 a singular one. That where a trespass is committed & the Pltff
suspects another man, & he will make oath that he suspects
such person, & no other proof can be had, then damages may
be recovered of such suspected person, unless the Deftt. (as he may
make oath) that he had no hand in the trespass. But another
part of the clause has prevented this being practised upon: it requires that the Pltff. should make out otherwise
than by his own oath, "that it is highly probable" the
Deftt. is the trespasser. — The swearing by others that the
trespass was committed, does not render it highly probable that the Deftt did it within the meaning of the Stat.
Therefore as the Pltff. is to adduce other proof to render it highly probable before he can swear under the statute, this
clause is seldom if ever used. — & besides if the Pltff.
fails by the Deftt's acquitting himself upon oath, then
the Deftt. recovers of the Pltff double his costs occasioned by the prosecution. This probably has deterred persons from using this clause of the Statute.

Another clause in the Stat. declares that if any
person commit any of the trespasses before mentioned,
having their faces blacked, painted or any way disguised; or
being so disguised shall beat or abuse any person, they

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shall be publickly whipped not exceeding 20 stripes.

- In the clause of the Statute is that where any damage is done on another's land, it being fenced so as to secure against Oxen, Calves, Cows & such like Cattle, the person he trespassed upon shall procure two able men of good report & credit to adjudge the damage done, which the owner of the beasts shall pay when known, on reasonable demand, whether impounded or not; but if the owner be known and lives in the same town or near it, notice shall be given before the two men make their estimation, so that they may have a chance to be present. The like notice shall be given of the damage adjudged, & if he does not approve of it, he may apply to some of the select men, who shall appoint two able and indifferent men to review & adjudge the said damages — which forms a rule of damages.

This action of trespass is frequently made use of in Court to try titles to land; & is sometimes in England. But a plea of not guilty a title cannot be tried. Where an action is brought before a Justice & title is plead by the Deft. the action can no further proceed before the Justice, but must be removed to the County Court, for a Justice has no Jurisdiction where the title of land is concerned.

Hat. 75

Our Stat. limits the time in which actions of trespass shall be brought to three years. It is the same in England.

Hat. 73

II. Dispossessing or Dissessing another of lands.

This is remedied by Writ of Ejectment & consists in an adverse possession or occupation of another person & may exist even where the Disseisee is not absolutely excluded, for he is disseised of the part occupied by the wrong doer if not of the whole, & he may elect his remedy of trespass or ejectment.

The ancient remedies to recover real property are all done away. We have no such writ of ejectment as the English have. I believe their mode of proceeding is used in all the U S except Conn. There was an ancient remedy in Eng. to recover the term for years which is now made use of by us, being a much more simple thing to try the title. This is the root of "ejectione firmae" It was brought where a lessee of a term for years, was turned out of possession, to recover his term. This was adapted to the purpose of recovering the fee by the lessor (i.e. the claimant) entering on the land & the lessee being ousted by an Ejector agreed on. The lessee brings an action against the casual ejector, & then the title of the lessor is tried. See. 3 Bl. 200.

Dispution.

Since this they have adopted a new plan, by which it is done more expeditiously. B sues A, C recovers Ejectment against him and C sends a friendly letter of notification to A. who is made D. A. on entering the entry of A, lease to B, of an entry by C. Here then the title comes up again. It may be that A will not compromise the title, & B cannot make out anything, the Court will order the name to be under A in the room of B. & then it will go by default. The damages recovered are nominal, & an action lies for the mean profits. However we have no practice of the kind in Court. I shall not go fully into it here, but refer you to 3 Bl. Com. 200, 1, 2, —

In Court the action of Ejectment is brought by the owner of the land. He states that he was owner of, & possessed the land & being so seized he was turned out & now demands possession with his damages & costs. This on principle it would seem ought to be a bar to an action for the mean profits, but the practice is universally otherwise, unless the Plt. gives for all the damages in the action of Ejectment for we have so long (80 or 100 years) practised to bring an action for the mean profits & to recover merely nominal damages in the action of Ejectment, that it cannot be set aside. — To be sure the point is settled that you may

recover the whole damages in the action of Ejectment or only nominal. If it is apparent in the judgment in ejectment that nominal damages only are recovered, then an action for the mean profits will lie. —

The Stat. of limitations runs upon this; tho. the substance of the action is amount, & not trespass. This is contrary to first principles in Mr. Reeves opinion, for the nature of the hand action ought to govern. —

It has been several times decided by the Superior Court that the form of the action where trespass & trover are concurrent, decides whether it is within the Statute of limitations; for we have no Statute of limitations barring trover. —

Of declaring in trespass on Real Property.

Young men about to enter into practice of the law are sometimes frightened with an idea of the difficulty of drawing declarations & pleadings. Let such console themselves with this circumstance, that if they understand the law, they can never be mistaken in declaring.

In trespass vi et armis you must aver in your declaration, that you was possessed of a certain lot of land (describing it) you need not state that you are tenant in fee.

Disseisin.

simple or for years &c. the possession is the thing; necessary state that the Deft. with force & arms broke the Pltffs said close (this does not mean an actual force, but a legal force) that with the like force he entered the close & cut down &c (describing what he actually did) to the Pltffs damage so much, for which & cost he brings his suit.—

You see then you have got to state possession in yourself; but the grounds of your possession need never be stated.—

If the injury is done by the Deftts cattle, you state he entered with force & arms together with the cattle, not that his cattle entered merely

Pltff Declaring in Ejectment.— In Eng. you must state possession of a term for years by the demise of such a person. In Ken.t where no fiction is used you must state a seizin if it is a freehold; i.e. that the Pltff was seized at such a time, & at such a time the Deft. ousted him, & that he still holds him out of possession, to his the Pltff damage so much to recover which together with the surrendry of the land the action is brought.

In case judgment in Ejectment is recovered for a sum in damages & also surrendry of the land, & the Pltff dies before it is enforced, how is it to be enforced? Where personal property (i.e. damages) only are recovered, an execution may al-

ways enforce the judgment — but that is not the case here, for real as well as personal property is recovered. There must be two suits by scire facias both in Eng. & Connt. one by the heir to recover the land the other Executor to recover the damages. The scire facias for the Land must be by the heir, altho' in many cases the Exr. is to have to pay debts.—

Another injury which may be done to real as well as personal property is a

III. — Nuisance. —

1 What a nuisance is.—2 The remedy. Nuisance is not merely an injury to real & personal property, but in a certain sense it may be said to be an injury to a mans person.—

1. A Nuisance is any thing done to the hurt or annoyance of Lands, Tenements & hereditaments, according to the definition of the elementary writers.— There is a species of Nuisance which is public. Concerning this nothing more will be said here, except that such nuisances affect the public only. Therefore must have a public remedy. In case of a public nuisance no one man can have an action unless he has received a personal or special injury.—

A private nuisance is an injury to persona

Nuisance

or real property, but it is not a direct attack upon it, but operates consequentially, for if it was the former it would be trespass vi et armis. Hence it is that a man by using his own property may commit a ~~trespass~~ nuisance. The rule is "sic utere tuo ut alienum non laedas".

1. The maxim is "cujus est solum ejus est usque ad coelum" Overhanging a man's house is a nuisance. 2. But what are ancient lights? In looking into the books we find that it is agreed on all hands, that they must have been made or erected a long time. Dr. Hamshire (I am informed) in a late decision in Term Reports has called them ancient if they have been erected 20 years. All nuisances in these cases depend upon priority.

Cro. Eliz. 118.

Doe & Hale 459.

3. The exercise of any offensive trade or the erection of any offensive buildings are nuisances, as Tan vats, Tallow chandlers shops: So the erection of certain kinds of buildings too near another's houses or lands, as stables (when the noise of the horses interrupt the neighbours) for as to a case at Hartford where stables were extended back so that they came close to a bed room where the man & his wife slept, the superior Court decided it to be a nuisance. Perhaps the circumstance that the man has no other place to build his stables in would alter the case. The privation of a fine prospect is not a nuisance

Cro. Eliz. 150 or Eliz.

Nuisance.

4. There are also many nuisances in the Lands. [illegible] Ponds are raised so as to overflow a neighbours land. There
1 Rol. 89. the overflowing has proved to be beneficial to the land it has been determined to be no nuisance.

The carrying on of some trades is a nuisance – as the
9 Co. 59. 2 Rol. 141. smelting business: – this also affects real property.

So when a stream of water runs through a mans land
3 Bl. 218. if it is diverted from "Ubi solebat currere" it will be a nuisance. –

So it will be a nuisance if a man above poisons or corrupts a water course, by building Dye houses, Tan vats &c To be a nuisance however it must interrupt some use to which the person below had been wont to apply it. So that whether these will be nuisances, yea, or nay will depend upon, first occupancy. – It matters not whether the spring issues on the man's land who does the injury. He cannot claim the water & say he will turn it off, use it, or corrupt it. – He may however turn some of it off if it will be no nuisance, provided he leaves enough to answer his neighbours purpose. –

Wherever there is a good site for a mill, below, the water above must not be diverted from it, so that not enough is left to carry a Mill.
2 Rol. 141 When a Mill below would be of more use than the water

Nuisance.

ing Cattle alone, the latter will be prohibited to the advancement of the same, priority notwithstanding.

There are cases where a man professing the same calling, trade, or avocation, will not be allowed to follow or pursue the same near another of the same calling &c upon the ground of its being a nuisance. So where a man sets up a ferry near a other having a ~~[illegible]~~ prescriptive right which is an incorporeal hereditament. But where a man having such right attempts to keep a ferry, he must do it with fidelity.

It is the case in many parts of Connt. where Lands have been granted to persons on condition that they keep up a Mill. here they are obliged to keep up the Mill in order to hold the land, & if any person undertakes to set up one above it, to the injury of it, it is undoubtedly a nuisance.

There was an Estate granted to a man early in the settlement of this State, lying about half way between Hartford & New Haven, on Condition that he kept up a Tavern at that place, the Estate is still holden & the Tavern still kept up. Would it be a nuisance to erect a Tavern near this?

Of Waste.

In remaining injury to Real property is that called Waste. Relative to this injury there is much law in England which will be applicable to these U. States. Some general observations. The action of waste at at Com. law was formerly maintainable only against tenants for life made so by operation of law, viz. tenant by the Curtesy & tenant in Dower; because other tenants might have covenanted in their leases or deeds to prevent waste. But by the Statute of Glouester 6 Edw 1st. other tenants were made liable as tenants for years &c. —

Waste supposes some injury done by the lessee, or by some person under him, or by his permission, & the reason that neither Trespass nor Ejectment could be brought in these cases, is for the want of that possession which the law in such cases requires the Pltf. to have. A leases to B, the latter being in possession cannot be sued (if he pulls down a house) in trespass by A, the lessor, because he is not in possession. —

By the Stat. of Glouester damage are not only recovered, but the thing wasted, i.e. it is a forfeiture of the property, & as it respects this, it is immaterial whether the waste was voluntary or permissive. —

Waste.

It is probable that in many other of the U. States, they recover the place wasted but they do not in Court. — There is likewise a remedy in Chancery to prevent waste which will be noticed presently.

There are a 1000 instances given in the books applying either to Houses, Lands, or trees.

It is waste if the tenant suffer the house to be destroyed either by exposure or by the act of another. He is not liable however to the full extent for providential accidents &c but of this hereafter. — The tenant must use due care & diligence. He is bound to repair unless there is a covenant to the contrary.

Co Lit. 53.

2 Rol. 815.

It has been held that where a man builds a new house or enlarges an old one, even if it benefits the premises it will be waste, on the ground that there must be no alteration in the Estate. — It has been held that changing one kind of Mill into another is waste. Mr R. presumes that it would not be considered waste in Court. —

Cro J. 182.

With respect to changing or altering Land* as meadows into arable & vice versa the same ideas of waste have prevailed. Just so as to cut timber, open mines, make fishponds, dig clay, make brick, &c.

*Moor. 101. Cro. J. 234. 296. 5 Bac. 462. Co Lit. 53. Bac. 57. 5 Com. 6, 7, 8. 2 Rol. 282. 2 Leon. 174.

A lease where he has a right to dig yet he must not open new mines unless the land is leased

2 Rol. 814.

Waste.

to him "without impeachment of waste," but he may work old mines.

But wastelands is held not to be waste. Cutting down timber in Eng. is held to be waste, i.e. whatever is supposed to be Timber for building is never allowed to be taken by the tenant. — The word timber is appropriate in Eng.—

The tenant has a right to take what is called "bote" as "Plow bote, bire bote, hay bote & hedge bote; but he is not at liberty to cut down wood for other purposes.

If there is dry wood on the premises, green wood must not be taken for fuel. — B. N. P. 59.

Timber may be cut down for repairing: but the tenant is bound to repair if there is no timber on the premises.—

It has been determined that where a man had Timber not suitable, but sold it to enable himself to buy more which was suitable, he was guilty of waste. — Reeve presumes it would not be considered so here if the question should come up. — All these rules are made so rigid for the purpose of restraining & binding ye Lessees & tenants Lessors & landlords. —

If the lessor cuts the woods on the lease of the tenant cuts it, it is not waste, but a Trespass on the lessors property, for he had never disposed of the woods.

Co Lit 53.
Hob. 296.
Bro Waste 150.
Co. L. 53.
Co Com. 080.
2 Rol. 844.

5 Ba 458.
Co Lit. 53 b.
10 Co. 139 a.
5 Com. 679.

2 Rol. 823.

Cro. E. 690.

Waste.

Who may bring this action?

Co. Lit. 53 b. 285 a. 6 Ba. 472. 5 Com. 673. 1 Rool. 144. It must be brought by him who hath the immediate Estate of inheritance in fee; but sometimes another may join with him.

The Estate may be so framed that no one can bring the action. as suppose an Estate is given to A for life remainder to B. for life, remainder over to C in fee. A commits Waste; B cannot sue because he is not the remainder-man in fee, neither can C sue because he is not the immediate remainder man. A hard Case!

1 Rol. 825. Co. Ent. 680.

Co. Lit. 54.

Mr Reeve knows of but four or five actions of waste which have been brought in Eaunt.

This is a personal action it must be brought against the person who does the waste not against his representatives; therefore if the tenant dies his Exr. or Admr. are not liable. Brown Law. 239. Contra.

2 Rol. 828. 5 Com. 676. 2 Inst. 302. Ventris 127. Bro. Waste. 138.

see Notes IV. at the end of this Title, where all the authorities are brought together.

Tenant at Will has not been mentioned because he cannot commit waste; for he has not a sufficient possession. He is liable as a Trespasser and any acts of his which would be called waste is a determination of his Estate.

560. 13.

A tenant at Will is said is not liable for lightning, or the attack of the common Enemy. yet has been determined

5 Ba. 468. Co. Lit. 53.

that the tenant is bound to repair, if the property thus wasted is tenantable, i.e. it is not so fully or totally destroyed by the lightning or enemy, as to render reparation inconvenient & impossible.

1 Co. 139b
1 Com. 681.

Who may bring this action is more fully treated of, in Notes IV.—

Leases "without impeachment of waste," and "Power of Chancery to prevent Waste."

Such being the law it has become the practice to make leases with the words "without impeachment of waste". In such cases the trees timber &c may be cut down & used by the tenant, for by such lease, he has a vested property in them, but he must take them off during the existence of his estate.—

It will be recollected that Chancery grants injunctions to stay waste wherever an action of waste might be brought at law.— Chancery has gone further. This Court has granted an injunction to stay waste where a lease was given "without impeachment of waste" & the timber or trees &c have been taken wilfully, maliciously or enviously.—

When lands are leased without impeachment of waste a property ~~of~~ in the timber &c is thereby vested & it has been

thought a stretch of power for Chancery to interpose. This will not be done except in cases of wanton or malicious waste either upon Houses or Trees, & where in fact such was not intended to be permitted at the time of making the lease. As where trees of ornament were cut down, or Houses stripped of their leads appendages &c.

1 Ver. 738.
1 Ver. 265. 521.

There are other cases of waste in which Chan. interposes As where A is trustee for B, here the legal title is in A, but still Chan. will not allow him to abuse the property by wasting it &c. The cestui que trust must not abuse it.

1 P. W. 528.
Ambler 167.
3 Bro. Ch. 565. 549.
3 Atk. 217.
3 Bro. Ch. 89.

So where there is an Estate to A for life, remainder to B for life, remainder to C in fee, here altho it is shielded at law against being sued for waste, yet Chancery will grant an injunction to stay waste on application of the remainder man in fee.

Another set of cases where Chan. have interposed at the instance of a stranger, in behalf of an infant; he the stranger clearly can have no action of waste.

There is one set of cases where Chan. interposes upon a different ground, as where there is a lease "without impeachment of waste" & the tenant during his term does not cut down much of the timber until just before the expiration, & he then concludes to make a sweep of the whole, & this to answer no beneficial purpose. — Chan.

1 P. W. 527.
1 Ver. 264.

will in such case interpose.—

The Estate of the mortgagor in
Amb. 176. possession is not a tenancy at will, but a distinct species of tenancy, the mortgagor here has not a right to commit waste, because he thereby lessens the security.—

Where a Mortgagee in possession dies, the Ex.r must receive the mortgage money; but may such mortga-
1 Salk. 161. gee commit waste? — If he does he must apply it to the payment of the mortgage, if it will be payment so far as it goes.—

The law on the subject of Waste in States

W. — **Waste**, is defined to be a spoil or destruction in
Co. L. 53.a houses, gardens, trees or other ~~pertaining~~ appurtenances hereditaments to the disinherison of him who hath the remainder or reversion
2 Bl. 281. Salk. 55. in fee simple or fee tail. Whatever tends to the depreciation of the value of the inheritance is waste.—

That acts shall be deemed waste in Lands.—

Co. L. 234 converting arable into wood, or a meadow, is waste,
6 Bac. 462. as it not only changes the course of husbandry, but the proof
Co. L. 53 of the evidence. 2 Bl. 282. Cook. 296.
1 Com. 78.

Dividing a great meadow into many parcels by ditching is not
5 Bac. 462. waste, for the meadow may be better for it, of more easy & profitable
2 Co. 74. 5 Com. 78. 2 Leon. 174 for the occupiers of it. 2 Conard. 210.—

5 Bac. 462. converting meadow into an orchard is waste, tho' it be to the
2 Leon. 174. profit of the owner. —

5 Com. 678. Digging up the surface of the land & carrying it away is waste; 2 Rol. 816.

It is no waste if the Land lies fal. i.e. is white means it is overrun with bushes &c tho' it is had husbandry. 2 Rol. 814. 5 Com. 679.

What shall be deemed Waste in trees and Woods.

In all Countries those trees that are usually used for build-
Co Lit 53a Dy. 65.a -ing, they are for that reason considered as Timber, & to cut down
5 Com. 679. such trees or lop them, or do any other act whereby the timber
may decay, is waste. —

2 Bl. 281. Timber is a part of the inheritance 4 Co. 62.

Co Lit. 53a If the tenant suffer young growing (or shoots) to be destroyed
5 Bac. 463. it is waste. 3 Com 679. — So it is waste if the tenant in cutting
down under wood (as he may legally 2 Rol. abr. 817) destroy or stub up the
Co Lit 53a young growing 5 Bac. 463. —

If the tenant cut down or destroy any fruit trees in the garden or orchard it is waste, but if
Co Lit. 53a they do not grow in the orchard or garden it is not waste.

Cutting down trees standing in the defence & safe guard of
1 Rol. 568. the house is destruction for which an action of waste will
2 Co 82a 535, b lie. Co Lit 53. 5 Bac 463. 2 Co. 126. 4 Co 63a. 64. 1 Rol. 507.

Waste.

Cutting of trees is justifiable for house bote, hay bote, plow bote & fire bote Co Lit 53. Rob 296. ~~Rol~~ Bro Waste 130. ~~as aforesaid~~

Co Lit 53.b The tenant may take sufficient wood to repair the walls, pales, fences, hedges & ditches as he found them; but he cannot make new
5 Com. 679. ~~c.~~ 2 Rol. 823.
5 Com. 679. If he cuts down for unnecessary repairs it is waste. 2 Rol. 822.

Cutting dead wood is no waste. Co Lit. 53. tho when alive they were timber 5 Com. 680. Co Lit. 33. 2 Rol 814. F. N. B. 59.

Converting trees into coals for fuel when there is sufficient dead wood is waste. Co Lit 53. 2 Rol. 820. 5 Com 679.

Co Lit 53.b If the tenant sell the trees, tho he cut them for reparations
5 Com. 679. & with the money repair, it is waste. So if he buys the trees
2 Rol. 823 back again and repairs still it is waste by the first selling.

If the tenant cut trees for reparations, & suffers the trees to lie & perish, it is waste. Bro Waste 112. 5 Bac 470. — Cutting wood to burn, when the tenant has sufficient hedge wood, is waste. 5 Bac 471 F. N. B. 59.

What waste shall be deemed excusable or justifiable.

It may be observed in general, that waste which comes from
Co Lit 53.a the act of God, is excusable. 5 Bac. 468. 10 Co. 139.a 5 Com. 681.

If apple trees are torn up by a great wind, & before afterwards cut them, it is no waste. Bro Waste 39. 5 Bac. 468.

Cutting of trees is justifiable for house bote, hay bote, plow bote & fire bote Co. Lit 53. Rob. 296. Bro Waste. 130.

Waste.

Who may bring an action of Waste.

This action must be brought by him who hath the immediate
1 Lit. 53.b 85.a estate of inheritance in fee simple, or fee tail, but sometimes
5 Bac. 472. another may join with him. 5 Com. 673.

If the reversion must continue in the same
6 Co. Lit. 53.a 55 b. state; that it was at the time of the waste done, and not granted
2 Roll. Ab. 825. over; for the reversioner takes the estate back
5 Bac. 472 again the action, ~~it~~ is gone; because the estate did not
5 Co. 674. continue.

If a tenant commit waste & he in reversion dies, the
2 Inst. 305. heir shall not have an action of waste for the waste done
6 Co. Lit. 341.a in the life of his ancestor; for he cannot say that the waste
53.b 356.a
5 Com. 674. was done to his disinherison. — 5 Bac 472. —

He who has the
1 Roll. Ab. 641. 825 inheritance may join another with him, who has not an estate
of inheritance, in an action of Waste; as husband & wife
may have waste; when the reversion or remainder is to them
5 Com. 673 and the heirs of the husband.

So if the reversion be granted to
6 Co. Lit. 53.b
A & B & the heirs of B, they may join. — 5 Com. 673. —

So a surviving parcener, & the husband of another Parcener
6 Co. Lit. 53.b being tenant by the Courtesy may join in waste. 5 Co. per Jeffs. 113
5 Com. 673.

So it is sufficient if the Pltff. has the immediate inheritance at
6 Co. Lit. 54.a the time of the action, tho' he had not at the time of the waste.
2 Roll. Ab. 829.

Waste.

Hen. 82. a writ of trial by probibility after. Mod. 387. 560. 6. Jones. 51.

It has been decided in Connt. to lie in favor of the heirs at
1 Root. 74. law against the tenant by the Curtesy — For the distinction
between waste & destruction See Gilb. L.E. 484. —

Against whom the action of Waste lies.

A common law, Waste was punishable in 3 persons
1 Inst. 145. viz. Tenant in Dower, Tenant by the Curtesy, & the Guardian,
5 Com. 679. but not against tenant for life, or tenant for years. 2 Inst. 299

So in Connecticut it has been adjudged to lie against
Tenant by the Curtesy. — This adjudication was in the Case
1 Root. 244. of Rose & vs Hays in New Haven County Jan Term 1791.

So it has been adjudged to lie against tenant in Dower
& tenant for life. 1 Root. 244. — 323. —

But it will not lie in favor of a remainder-man against
2 Root. 20. a stranger, for there is no privity between them. —

The action of Waste shall lie against tenant by
2 Inst. 76. 2 Vol. 82. the Curtesy, for waste he committed by a stranger. Co. Lit. 54a
Co. Lit. 5. — 5 Co. 97. — 2 Root. 20. —

If tenant in the Curtesy aliene
Co. Lit. 54 his Estate to another, & he commits waste, an action
5 Com. 676. 2 Inst. 301. lies against the tenant by the Curtesy; for notwith-
Co. Lit. 54. standing the alienment the privity of Estate still remain
Co. 297. Prov. 239. — 22 Vin. 46 a. — 9 Co. 142. — 3 Co. 23a Co. Lit. 2; 3a. 3. 6.
2 Root. 82 & Ex. 4. B. 55. 2 Co. Co. Lit. 55. 8. Fitzherbert Waste. 67. 122. Bro. Ab.
Rep. 7 & 2a Cro. E. 732. holds Contra. the waste

and the action in such cases must be against the tenant

by the Courtesy, if not against the assignee. Com. 676. - 2 Inst. 301.
and authorities to the last rule.

If the Lessor grant over his reversion, then the privity of Estate is gone, if his grantee cannot bring waste against the tenant by the Courtesy, for waste done by the tenants assignee. — or in other words if tenant by the Courtesy assign his Estate, if the heir before or after his assignment grants the reversion, the Grantee shall not have waste against the assignee for waste done committed, for the privity is gone. —

Co Lit 54a. 2 Inst. 301. Com. 675.

If tenant by the Courtesy, or in Dower or, or for life dies after waste committed, waste does not lie against his Exr. or Admr., for it is as the says. which is an action personal, which dies with the person. Bro Waste 138. 2 Inst. 302 Winter. 127. — But Brownlow. 239. says that an action of waste lies against Exr. or Admr. for waste done by the testator. —

2 Rol. 828. 5 Com. 676.

Wingate says that if the tort committed by the testator or intestate has benefited his Estate, the Exr. or Admr. is liable; but if the Estate has not been benefited the action does not survive, against the Exr. or Admr. even tho. the party aggrieved has been injured by the tort.

L. Reeve apprehends, however, that the enquiry ought not to be whether the assets have been benefited, but whether

Waste.

another has been injured by the tortious act.

The action of Waste is a species on the case. 2 Swift. 84.
The declaration should describe the Lands, & set forth the title of the Plaintiff & Defendant, & the particular acts of waste done, for which he recovers single damages, & there is no forfeiture of the land wasted. — 2 Swift. 84.—

Timber.

"It is the custom of the county, that some trees timber, which in their nature generally speaking are not so. By "timber" we mean such trees as are fit to be used in building & repairing houses. Walnut (he says) being no ways proper for this use in England nor here."

1 Dall. 606. 1 Chan. Ring.

"Again it is the custom of the County which ascertains which are timber trees, making some to be esteemed such, which in their nature generally speaking are not" — and the Chancellor in this case directed an issue to try what trees are by the custom of the County to be accounted timber.

1 Dall. 606.

The cutting down decayed timber is as much waste as the cutting down any other timber per Richardson C. J. & Thos. the Defts Counsel attempted to make a distinction between cutting down sound timber trees that are not come to their full growth, & decayed timber,

5 Ath. 95.

Waste.

3 Atk. 95. I know of no such jurisdiction either in law or equity."

The Pltff may certainly come into this Court to restrain the Deft from committing waste even if he has only threatened to do it; nor is it necessary that the Pltff should have waited till the waste is actually committed, where the intention appears; as if the defendant ~~in~~ by his answer insists on his right to do it.

If a bill is brought by an heir of a reversion against a tenant for life, & no proof appears of any waste, yet if tenant for life insists upon his right, & it is proved that he has more, this Court will grant an injunction.

2 Atk. 183. 1 Ca. Ch. 44.

This Court has gone greater lengths to stay waste, than the courts of law have in giving actions, or granting prohibitions against it.

3 Atk. 216.

In order to obtain an injunction to stay waste, a particular title must be set out.

Browns Rep. 57.

Injunctions for staying Waste.

By the common law a prohibition went out to restrain against tenant in the court, in Dower & waudian at the prayer of him who had the inheritance to inhibit waste before it was begun to be committed. In conformity to this practice, but more general in extent is the mod-

2 Inst. 299. 3 Woodison 398.

-ern usage of inhibiting waste ~~by~~ an a bill filed for that purpose. —

Who is entitled to such injunction

"This remedy lies, not only where an action of waste might
1 Iron. 69. be brought, but in many cases where the party could not
be sued at law. 2 Ch. Ca. 32. 1 Eq. ca. ab. 400. 2 Freman 5.
175
The words of L. Hardwicke on this point are as follows.
"This Court has gone greater lengths to stay waste than
the Courts of law have in giving actions or granting pro
30 Ath. 210. hibitions against it.

A bill to obtain an injunction a-
3 Wordesor 400. gainst the commission of waste may be filed on behalf
of an infant in ventre sa mere. 2 Ven. 711. — 1 Ver. 555. —

Some have said that Com. Dig. is no good authority
to Comyns is frequently cited to the forgoing rules, it may
not be amiss to remark that L. Mansfield has declared
that Com. is a good authority. so says J. Reeve. & so says
L. Kenyon 3 Term. 361. —

Actions of Waste which have been brought in Connecticut. — .....

1. This was bro.t in 1702 ag.st tenant for life. & adjudged
to lie. 1 Root. 244.

1 Root 244 2. This was bro.t ag.st tenant by the courtesy & decided to lie

3. — This was bro.t ag.st tenant in Dower & decided to lie. 1 Root. 325.

Waste.

4. — This was an action brot. by a remainder man against a stranger & adjudged not to lie, for there was no privity between the Pltf. & Defendant. — 2 Root. 20. —

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Powers of Chancery

The general powers of Chancery are not easily defined.—

Mitf. 5. The principal difference between a Court of Law & a Court of
3 Bl. 429. Equity is said by Ld Kaims to consist in two particulars.—
10 Mod. 1. 1. That it is the province of a Court of Equity to abate the rigour of the Common Law. 2. That a Court of Equity decides according to the spirit of the rule, & not according to the letter.— Again: it is said 3. that fraud, accident and trust are peculiarly cognizable in Chancery. 4. It has been said that a Court of Equity is not bound by rules or precedents.—

As to the first, particularly; a power to abate
3 Bl. 430. the rigour of the Common Law was never even claimed by
2 Bl. 208. a Court of Equity.— In many cases the rules of the Common
2 B. 243. Law operate inequitably, & may be said to work extreme
378. 227. 455. hardship; but in such cases if it appears upon a fair construction that they are within the Common Law rule, it
2 Vth. 239. is impossible for a Court of Equity to afford any relief.— it being perfectly clear that Equity cannot control law.—

As to the second; a Court of Chancery is as much
3 Bl. 431. 435. 8. bound, as a Court of Law, & no more, to decide according to
Bl. 61. the spirit of the rule. "Qui haeret in litera, haeret in cortice"
Fon. b. 22 is a maxim of the Common Law. The rule of construction
Doug. 264. is the same in both Courts.—

As to the third: Fraud, of perhaps every kind, is in
Bro. 671. some way cognizable in a Court of Law, & sometimes ex-
8 Term. 147.

Powers of Chancery.

2 Atk. 287. 5 T.R. 695. clusively so; as in case of a devise obtained by fraud. 2 Atk. 17. Many accidents are also remedied in a Court of law; as loss
5 Com. 745. of deeds, mistakes in accounts, contingencies, that make the per
3 Burr. 151. 152. formance of a condition impossible &c. Many accidents are
2 H. Bl. 263 not relievable in a Court of Chancery. Technical trusts indeed
1 Wils. 16. are generally cognizable only in Equity. Trusts are not however always; some are adverted to and enforced in a Court of law
3 B.L. 431. as bailment, the implied contract for money had and receiv
to another's use &c.

As to the fourth head, Courts of Chancery
1 Atk. 600. 3 B.L. 432. are clearly bound by rules of precedents. The Chancellors
3 Ch. W. 640. 4 Burr. 289. of this day consider themselves bound by inconvenient and
316. 2 Atk. 520. 2 Ch. W. 321. objectionable rules; may in some instances, by the absurd
112. 4 H.7. note rules of their predecessors.

The essential difference between a Court of law & an Equity Court, consists principally, in the different modes adopted by the two Courts in administering justice. 1. in the mode of proof. 2 In the mode of trial. 3d in the mode of relief.

1. As to the mode of proof. A Court of Chancery compels defen
3 B.L. 381, 2 dants to disclose under oath, all such facts affecting the rights
4 T. of the parties, as rest only in his private knowledge. Hence the jurisdiction of Equity is distributive, contingent upon discovery. Being thus obtained, the judgment is the same as it would have been in a Court of law.

2. As to the mode of trial. The trial in Equity is by interrog
Ch. C. 3. 3 Ch. 282. atories, in writing, depositions are taken out of Court. The

witnesses are abroad, or shortly about to leave the country, or are aged or infirm: The depositions are to be taken by a commission issuing out of Chancery for the purpose. — In consequence of this power to take depositions, Chancery exercise a jurisdiction which would be unused at law, if the witnesses could attend. —

3. As to the mode of relief: A court of Equity can grant specific relief, which a court of law in ordinary cases cannot do — as in case of Executory agreements to sell or purchase lands &c. In this case, a court of Equity will compel a specific performance of the agreement, i.e. will oblige the party who is bound by it to execute it specifically. But a court of law in such case, can only give damages for the non performance of the agreement. —

Upon these three, & two other incidental grounds

3 Bl. 436. 4, 9. viz. the true construction of securities for money lent, and the effect of a trust, rests the jurisdiction of Equity as contradistinguished from a court of law. —

Mr Swift seems not to have perused with sufficient

2 Swift 420 422. attention, the pages of Judge Blackstone, where this subject is considered; particularly the two last grounds of equitable jurisdiction. —

The Power of Chancery to decree specific execution of Contracts. —

— A power which Chancery exercises exclusively, is that of decreeing a specific performance of Contracts. This power is not understood that Chancery can enforce an execution to

carry its decrees into effect. The mode of enforcing is to impose a penalty in case of disobedience.

At common law this power of decreeing a specific performance did not exist, but the only remedy on a bonhaut was in damages. This power is not exercised by Chancery because no remedy can be had at law, but because justice in many instances, requires that a different remedy should be had. And it is a general rule that a bonhaut to be enforced in Chancery must have all the requisites of a bonhaut binding at law. No Statute ever vested Chancery with a power of decreeing specific execution of agreements, but from the time of Edw. 4th such a power has been exercised by the Court, & since the great contest between Chancery & Kings Bench in the reign of Jas. 1st this power has remained undisturbed. —

Tin b. 416
Latch. 172
2 Ow. b. 46.
2 Ver. 357.
368.
1 Fonb. 178.

The jurisdiction of Equity is discretionary in most cases whether there is a remedy at law or not. 2 Pow. Marriage agreements before Coverture, will be enforced in Chancery after marriage. A bond also to secure marriage settlements &c is considered in Chancery as an agreement and enforced accordingly. Such a bond is now good at law 1 Bl. 442. — 2 Pow Con. 5. 6.

2 Ch. 480
1 Sw. b. 477.
2 Ab. 255
Fonb. 137
2 P. W. 243.
2 Atk. 97.
1 Fonb. 89
95

When there appears to be an agreement by a in substance though it be void at law, Chancery will carry it into execution according to the intention of the parties.

2 Pow b. 17.
2 Ven. 157.

When a bond is given before marriage by a woman to her intended husband to convey land to him after Coverture, it was

2 P. W. 242.

considered in Chancery as a good agreement.

If one of two joint obligors pay the whole sum due
2 Ch. Ca. 47. on the bond, he may apply to Chancery to obtain a proportion-
1 Ac. 315. able share from the other in Eqy. by a petition in Cham.
2 Ch. 671. But the remedy in Contrt. is to bring an action of Indep. Ass.
3 Sam. 423. for money paid out & expended to the Dept. use. In Contrt. a
Kirby. 116. suit of contribution in the nature of an Indep. Ass. lies in
Sam. 186. such case to recover what the obligor ought to pay. But no
contribution is allowed in law or Equity in case of joint tort
feasors or wrong-doers.

If either the persons contracting or the sub-
2 Pow. 6. 7. 9.
2 Ch. Ca. 494 ject of the contract be within the local jurisdiction of a court
1 Ves. 204 of Cham. it will take cognizance of the cause. This rule is in-
477. tended & apprehend, to apply to those cases, in which the subject
matter is proper for equitable jurisdiction. —

It is a general rule when-
1 Bl. 322.
1 Pow. 6. 6.
14. 254. ever a Court of Law will give damages for the non-performance
1 Pow. 139. of a contract respecting real property, a Court of Chancery will
17. 359.
1 P. W. 282. direct a specific execution of it. Tho' not against a purchas-
429. er for a valuable consideration without notice. In other ca-
ses Cham. will not generally interpose.

Yet in cases where the a-
2 P. W. 243 - 2 Pow. 6. 14. 17. 254. —
~~Cha. p. 84.~~ greement arises under the acts of the Court itself, or where there
~~1 Ves. 447.~~
~~1 Atk. 90.~~ is in substance a bona fide contract or agreement, but by
~~2 P. W. 305.~~
~~3 Atk. 383.~~ reason of some formal defect, a Court of Law cannot give
~~2 Ch. Ca. 87.~~
~~488.~~ damages, Chancery will decree a specific execution. 1 Ed. Ray. 515

It is a critical rule that Cham. will not interfere to

to decree the specific execution of a contract where there is an adequate remedy at law; & this rule has been more rigidly adhered to in Connecticut than in England. —

This power of Chan. is usually exercised about contracts concerning real property only. — The Court of Chan. will not generally interfere to decree the specific performance of contracts respecting personal property because in most cases the damages given by the Courts of law for non-performance, are considered a ~~sufficient~~ sufficient compensation.

But if a contract concerns personalty as well as realty, & damages are an inadequate compensation for the loss, Chancery will decree specific performance.

Whenever a party obtains a decree for the specific execution of a contract which is in his favor, he will be enjoined under a penalty, to perform that, to which he was bound, on the contract. —

But when damages would not be an adequate compensation for a personal thing, Chan. will decree a specific performance — as in case of an agreement to transfer stock, which is continually rising in value. — 2 Swift 457, 8

In a Court of law, the value of the article at the time fixed for delivery, or performance of the contract, is always the rule of damages.

If a Statute enacted after the making of a contract renders a complete performance impossible, part performance will be decreed, in case the party claiming performance derives. So if the same effect is produced by the act of God. —

It appears from the contract that the Subpoena was to have

2 Pow. C. 215
Cr. rep. 84
Ver. 447.
Ch. W. 571.
2 P. W. 305
3 Atk. 383.
2 Ver. 487.
188.
2 Ev. Com. 219.
1 Fonb. 383
2 Ver. 17.
2 Pow. 217, 232.
2 Ver. 394.
1 Pow. 408.
1 Ver. 217.
Cases 221.
1 Fonb. 207
2 Ver. 254
1 Pow. 778.
2 Ver. 81.
Ch. 281.
1 Ch. 241

his election, whether to perform the contract or pay the money.

1 P.W. 570. Chan. will not decree a specific performance. —

It is a rule of the English law where one conveys by devise

7 Ves. 533. 2 do. 447. 5 do. 299. 320. 4 do. 82. 294. 6 to 16, 17. grant &c for life & to his issue, or to the heirs of his body; the grantee devisee &c take an Estate tail. But if one of the limitations carries an equitable & the other a legal Estate, they will not their rantier. — If the grant &c were to a man "for his

1 Burr. 38. life & to his heirs generally, a fee simple would rest in the first taker. — Yet if from the terms of the devise, it appears the intention of the devisor, to give a life estate only, to the first taker, Courts of law will give effect to the intention. A distinction is to be taken between cases in which the first devisee has children at the time of the devise, & those in which he has not. — In Chancery to "A for

2 Ros. & 41 life & to the heirs of his body, or to his heirs general" are con-

1 P.W. 123. 2 P.W. 399. sidered as giving an Estate for life only; & no other words are

1 Ford. 399. necessary to manifest the intention of the devisor; except in cases of executory agreements. —

Whatever is agreed to be done

1 P.W. 61. 1 Atk. 572. Chan. considers as done from the time of making the con-

2 Ran. 56. tract, unless some other time is fixed for the purpose. And

79. 32. 68. 11 Mod. 468. even if some other time is fixed for execution, the property will

1 Ford. 413. 359. be considered as already transferred, if the terms are settled, & the formal act or execution only remains to be complet-

ed. This rule however is not allowed so to operate as to shelter

2 Ran. 6. 69. 467. an heard Purch. if a Vendor of Land after entering into articles to convey holds the title deeds, & is thus enabled to sell the

1 Ford. 359.

Powers of Chancery.

1 P.W. 374. 382. 429. 2 Com. 338. land a second time; this second sale if to a bona fide purchaser shall be binding the articles notwithstanding.

When there has been no actual contract of sale, but merely an agreement in future, Chan. does not consider the property as transferred, but as belonging to the original owner, who of course in case of a sale, must bear it.—

2 Ves. 79.

If a contract was originally mutual & equal, Ch. will enforce a specific execution of it, tho' by subsequent events it has become unequal; otherwise, if there was originally a want of mutuality, or certainty.—

2 Ves. Par. Ca. 415. Ve. Ch. 156. 2 Ves. 132.

Money articled to be laid out in the purchase of land is in Chan. considered as land. It will pass by the devise of all ones real Estate. Yet a person who has the absolute ownership or fee simple of money, thus circumstanced, he may at his election, consider it as personal, or as real Estate, & of course bequeath it by a will not attested by witnesses.—

2 Pow. 83. 112. 236. 240. 1 P.W. 483 3 do 221. 1 Coll. 713 416. 1 Ven. 536. 583.

Money agreed to be laid out in land, is subject to the husband's tenancy, but not to the wifes dower.—

When a bill is brought for the specific execution of a contract for money paid, if the deft does not demur or object to a trial in Chancery that court will decree a specific performance.—

2 Pow. 216.

So if an agreement is denied in Chancery, & an issue is directed, that court will reserve the equity, arising from the facts found, & make a decree accordingly. 2 Pow. 216, 17. If no s have been given for the performance of a variety of

as to, Chancery will to prevent the trouble & & security
1 Ver. 189. of suits for every breach, fix a penalty, which will either
3 Atk. 383. compel a strict performance, or be an adequate com-
pensation for non-performance. Articles of agreements
between merchants, are thus treated. —

Agreements to transfer stock are specifically enforced always.
10 Ves. 5. 7. Chancery will sometimes decree a specific execution of an a-
2 do 385.
3 Atk. 383. greement, against which they would not grant relief: as
2 Ver. 143 225. in case of an unreasonable contract unattended with
1 Bro. C. 226. fraud.

Any unfairness in the petition in Chancery will pre-
2 Ver. 221. vent an interference of its power in his favor.
2 Ver. 72.
1 Ver. 227. A contract must be certain and originally mutual
2 Ver. 221. or no decree for a specific performance can be obtained. —
2 Ver. 72.
1 Ver. 227.

An executory contract merely voluntary, is seldom enfor-
1 Ves. 7. ced in Chan. On such a contract even if under seal, nom-
4 50.
1 Atk. 10. inal damages only can be recovered at law. — What Mr
2 Ver. 441, 2 Powel means when he says that nominal damages
2 do. 241, 256 only can be recovered at law, Mr Gould cannot conceive;
for in contracts under seal the consideration can never
be gone into in a court of law. — I presume he meant
that when it appears upon the face of the instrument
that it is without consideration, that Chancery will not
enforce a specific execution. —

When nominal damages on-
10 Ver. 341.
2 do 242. ly are given at law Chan. will not decree a specific exe-
cution. ——

Power of Chancery. –

It is a general rule of Chan. rescinds an agreement, it will by its decree do perfect justice between the parties; of course many contracts will be rescinded in part only; as where part payment has been made. –

It is a rule that where there is a mistake, without which the agreement or contract would not have been made, Chan. will rescind. –

1 Ven. 32 So where parties have mistaken their rights, in framing restraints, Chancery will relieve against them. as where a man having been drawn into a contract by duress affirmed it after the duress had ceased, not knowing that it might be avoided. –

1 Ver. 126. 400. –

A Court of Law will interpose and give remedy, where money has been paid by mistake. But in this case Indebitatus. is in nature of a bill in Chan. – But tho' contracts will be set aside by Chan. if procured by mistake, misrepresentation, false suggestions &c yet in common cases of the kind, Chancery has directed a perpetual extinction – as where a lying, sharper had prevailed upon a man to devise his Estate from his family by intrigue, he was himself defeated by counter misrepresentation, which induced the testator to revoke his devise and to give his Estate to his family. –

2 Pow. 176 222. 224. 261. –

Where there is a fraud in real Contracts, Chan. will interpose & give relief. In case of personal contracts there interposition is not universal. Not even if the contract be personal, & one of the parties be exposed to injury from the bankruptcy of the other

Chancery will step in to his relief.—

Judge Reeve supposes inadequacy of price will render a bargain void in Equity. This inadequacy at least furnishes evidence of something that will make a bargain void.—

3 P.W. 130. no. 1 Pow. Con. 29. 1 Atk. 17. 1 Ford. 62.

Intoxication is a sufficient cause for setting aside a contract in Chancery, if it were designedly by the opposite party.—

Judge Reeve thinks that Chan. ought to relieve where one has had advantage of the intoxication of another in a bargain, whether he was instrumental in the intoxication or not. Chancery will also interpose and set aside contracts entered into, for the purpose of defrauding 3d persons.— 2 Pow. 6. 1 Ver. 475.

2 Ver. 764

Fear occasioned by some unlawful violence, tho' it does not amount to legal duress, is a sufficient ground for Chan. to proceed upon in rescinding a bargain.— Yet a suitable degree of observance for parents & other superiors, furnishes no ground for relief.— A court of law can give damages only in case of a legal duress.—

1 P.W. 118. 639. 1 Bro. C.C. 369. 2 Pow. 160. 18 V. 264. 3 P.W. 292.

Contracts repugnant to sound principles of policy, will be rescinded in Chan. There is no good reason Mr Reeve thinks why a remedy may not be had at law in all those cases. Indeed courts of law have made advances towards granting remedies on the broad principle of policy, but they dearly to ask their stand and say thus far will we go, & no farther.— and now in all those cases in which agreements will be set aside at law, there is no need of the interposition of Chan. — since an illegal contract

2 Pow. 166 2 Bro. 375.

is a nullity, and need not be rescinded.

But there are two classes of cases under this head to which courts of Law have never extended their jurisdiction. The first of these is the case of marriage bonds & contracts; which are set aside in Chan. on the ground that they have a tendency to destroy domestic peace.

3 P.W. 131
2 Ves 346.

The 2d class of cases consists of ~~cases~~ bargains for the sale of young heirs as they are called in the books. Such contracts are rescinded in Chancery because they tend to encourage prodigality.—

2 Atk. 34.
1 Ch. 364.

Had courts of law extended their own principles so as to embrace these two classes of cases, the interposition of Chancery would be superfluous & unnecessary. In Eng. Chancery exercises a jurisdiction over usurious contracts. In Connt. such bargains are set aside in a court of law. When the statute on the subject was first enacted, if a man was sued on a usurious bargain, & compelled by force of law to perform it, he might come into a court of law again, & recover the sum paid. This in case of an action brought on the contract was an adequate remedy. But the party in whose favor the contract was, might delay to bring the action, till the evidence of the usury was lost, in which case the opposite party would be remediless. But here the parties by the interposition of Chan. are placed in the same situation as before the bargain.

1 Atk. 450

The ground on which Chan. interferes in usurious contracts is the presumption that undue advan-

vage has been taken. And had the law extended relief to these cases only, where such advantage had in fact been
3. Mk 393. taken, it principles would have been preserved entire. But Chancery will relieve against all usurious contracts whether they were obtained by undue advantage or not. — The reason why a party goes into Chancery in Eng. is, that he has there a remedy which he cannot have at Law, by appealing to the conscience of the Deft. The statute against usurious contracts it is true, subjects the criminal party to a penalty, & it is a rule that a man is not compellable to testify, where by so doing he will subject himself to a penalty. But as the penalty in Eng. is given to the party injured, he of course may waive it, & call on his opponent to testify. — In Com. the party demanding unlawful interest, is made liable to a penalty which is given to any common informer, & therefore according to the Com. Law rule, such party cannot be compelled to testify. — But this case is provided for by Statute. — For if an action is brought on an usurious contract, the Deft may file a bill in appeal to the conscience of the Pltff. who if he refuses to testify will be nonsuited, & compelled to pay costs. — If he do testify, & the contract is found usurious, judgment is that the Pltff. recover the principal only of the sum loaned. Such are the provisions of the Statute, that judgment must always be for the Pltff. — For if the contract upon which the action is brot. be wholly usurious, that is, such an one as is entered into, to recover unlawful interest on another

contract, the Court will give nominal damages only.

Chancery's interference to set aside unlawful contracts

The idea that a man might avoid a contract at Law is a novel one.—

Originally no parol proof could be admitted,
2 Wms 347. to shew fraud, imposition, or mistake, & hence we see the reason for the interference of Equity. But now in Eng. parol proof is admissible of every description.—
In this country we have gone still further, & admitted such proof to shew fraud of any kind.—

2 Wms 339. Bonds given in consideration of past cohabitation,
1 Ma. 641. & even such as that are given in consideration of future
4 Bro. 568. cohabitation are void.
1 Ch. 78.
2 Ch. 132.

Arrangements merely voluntary are not in general enforced in Chancery, yet in some cases they are; as where a man
1 Ves. 341.
2 do 242.
274.
after marriage makes a reasonable settlement on his wife
33 Geo. 22.
475.
2 Ch. 240.

If one seeking a specific execution of an agreement, has himself shewn backwardness, in performing his part, Cha. will raise interpose in his favor, especially if circumstances are altered, in his conduct, or during his delay.

When a contract has been dormant for a long time,
2 Ves. 260.
5 Ves. 534.
Chancery will not decree a specific execution unless special circumstances warrant the neglect.—

When contracts are rendered void at Law by reason
2 Ves. 274.
418.
of the Statute of Frauds, Chan. will in some cases interpose &

enforce them. As where the contract is executed, or partly executed on one part, or where something has been omitted in the written contract by fraud or mistake &c. —

In latter times Chan. has ~~occasionally~~ exercised a power of relieving against penalties. — Not longer ago than when Sir Thomas More was first Chancellor, this power had never been exercised. Since that time Statutes on the subject, have been made in Eng. and in several of these U. States. These Statutes embrace all cases where one binds himself under a penalty, to pay money on a certain time, or to do some collateral act, & vest in Courts of law, the power to channel down such bonds to what is justly due. We have such a statute in Conn. —

The ground on which Chan. gives relief in these cases, is that it is contrary to sound policy, to give exhorbitant penalties, & the Court in no instance have given relief where the penalty is small. —

If it appears from the contract, that the sum to be paid, is in the nature of ofsetted damages, for non-performance, Chan. will not relieve. But if on the other hand the sum to be paid is merely a security, for performance, the Court will channel it. If neither of these meanings can with safety be collected from the face of the contract, the sum conditioned to be paid, ~~the~~ ~~sum~~ is always construed to be in the nature of damages ofsetted or a penalty. —

1 Pars. 204.
2 Vern. 316. 289.
3 Atk. 520.
9 Mod. 112.

Yet it seems, where Cha. can give some compensation in damages, & where there is some value or rule by which to estimate

2 Pars. 205.

mate those damages, Cha. will not relieve, tho the covenant or agreement actually operates by way of a penalty. —

2 Ver. 60. 2 Raw. 204. 1 Ab. 207. 214. — If a bond with a penalty is given ~~with~~ for the performance of a contract, or if a penalty is inserted in a contract to enforce performance, the party seeking specific execution must in his bill, waive the penalty. —

2 Raw. 214. 1 Sid. 442. 1 Ver. 544. If a bond has been given for the performance of a contract, Chancery will direct an issue of quantum damnificatus in a court of Law, and decree according to the verdict of a jury. —

2 Pl. 19. 10 Mod. 517. 2 Ver. 5-2. 6 Bro. Ch. 417. If a bond to perform a collateral act, or to pay money by different installments be sued upon, the court will charge it, as often as an action is brought, if this may be as often as any breach happens. —

Chancery will never relieve against a penalty, however large, imposed by itself, to compel obedience to its own decrees. —

If a contract be entered into respecting real property, & the parties bind themselves under a penalty, which happens to be in the nature of damage for non-performance, Chan. will not decree a specific execution of the agreement. But if the penalties appear to be a security for the performance, a specific execution will be decreed. Thus it seems each case under these rules, will stand on its own merits. —

2 Ver. 119.

The remedy at Equitable jurisdiction is a mortgage.

The same evil necessarily exists upon mortgages, as upon penal bonds, & equally called for the interposition of Equity.

Powers of Chancery.

At law mortgages are regarded as absolute Estates in mortgagees, defeasible only upon the performance of the conditions. Thus the mortgagor was often oppressed, since it would frequently happen that he could not perform the conditions by the time stipulated, and since a mortgage was frequently held as a security for a debt, not amounting to one half of the land. The doctrine which prevails in Chancery is very different. The mortgagee is considered as merely a trustee to the mortgagor, when the condition is performed, the Estate is in the mortgagor. It is a general rule that every naked trustee is compellable in Chancery to reconvey. Such a trustee, the mortgagee after payment is considered. In compelling the trustee to reconvey, Chancery will always do complete justice between the parties, without adverting to the sum that might be recovered at law. —

There is one case that falls within the jurisdiction both of Law and Equity. Where compound interest is reserved on a note, and the event of non-payment of annual interest, both Chancery & law will relieve against the compound interest. — Yet interest is always to be paid annually, unless it be otherwise agreed, & therefore a contract reserving interest upon Interest is not usurious. The principle upon which the Court interferes in this case, is said in the books to be, that to allow of such interest is unconscionable. But J. Reeve supposes that policy is the true ground of interference, for if compound interest was allowed, some who would otherwise support their families, & educate them so as to be useful, would be reduced to beggery. They must be rescued from the consequences of their own follies

Powers of Chancery.

Power of Chancery to issue Injunctions.

3 Bac. 173. 2 Com. 46. 50. The injunction to stay waste, may issue from Chancery in all cases in which action of waste will lie at Law, & in many cases where the action of waste will not lie. - Thus Courts of law can never give a remedy in an action of waste, against one who has the legal title, as a trustee; yet Chancery will issue an injunction against such trustee. —

2 Show. 69. Eq. cab. 221. Chancery will also issue a similar injunction against tenant in tail, after possibility of issue extinct, tho' he is not liable for waste at law. - In this last case however, Chancery will not issue an injunction unless the tenant has committed unreasonable & wanton waste. —

The action of waste never lies at law against one, having a larger interest than an Estate for life. Nor no person can maintain an action of waste, unless he has an estate of inheritance. 2 Bl. 281.

The action of waste will not lie in favor of a remainder-man or reversioner; if any other estate intervenes between his remainder, & the particular Estate in esse. - Yet Chancery will grant relief by an injunction in favor of a remainder-man so circumstanced. So in favor of a contingent remainder-man.

2 Ff. 227. 2 Swift 82. 2 Atk. 94. 723. 2 Cane. 450.

2 Mon. 169. 2 Van. 738. Bro. C. 242. 2 Atk. 210. 1 Atk. 110. 2 Ch. 107. If a lease for life is made without impeachment of waste Chancery will notwithstanding these words issue an injunction against the lessee if he commits wanton waste. - 2 Bro. Ch. 89. - It in case "without impeachment of waste" mines are men-

tions among other things: old mines opened may be wrought by the lessee. But according to the authorities, new mines cannot be opened. — This rule must frequently be contrary to the intention of the parties, especially when no mines are opened at the time of making the lease. —

The injunction to stay proceedings at Law, or after the suit commenced; after verdict & before judgment, after judgment & before execution: or even after execution. This injunction lies against suits on all contracts, which tho' good at law are void in Chancery. —

3 Bac. 172.
2 Com. 46.
1 Ven. 229.
489.
2 Ven. 71.

Chancery when it issues an injunction, lays a penalty to enforce obedience; which penalty in Connecticut may be enforced in Courts of Law. The Federal Court however refuse to sanction, or retain an action for the collection of such penalty.

Injunctions are either temporary or perpetual. Injunctions are usually to the parties or the Court, but not always. — The Coun.t fraud may be pleaded in bar of an action at law — yet the party injured by the fraud, may have a remedy in Chancery, since the opposite party may delay to bring his action, till the evidence of fraud is lost. —

In England if one is sued on a contract which on a bill filed in Chancery is found to be fraudulent, Chancery will issue a particular injunction to stay proceedings at Law. —

1 Ven. 489.
2 Com. 48.

Injunctions are sometimes granted without a trial; as if one be sued on a contract where a recovery must be had at law, but which is void in Chancery. — And the injunction is tempo-

-ray; but if the ~~evidence~~ decree is in favor of the petitioner, the injunction becomes perpetual. If judgment has been pronounced at Law, the injunction goes against the Court & party, to prevent the taking out of execution, if execution has issued it goes against the Sheriff to prevent a levy. — If money has been collected on the process, it goes to prevent the Sheriff from paying it over. — But after the money has been paid over no injunction will issue. —

1 H. & R. 628. 3 Ov. 357, 6 Amb. 56.

In Coun.t an Superior Court is a Court of Equity, as well as of Law, as is also the Court of Common Pleas, of course, it may frequently happen that these Courts will have to issue injunctions against themselves. A case of this description arose in the Superior Court. — An action at Law was brought on a bond in which there was a mistake of £10, & in consequence of the rule, "that no parol proof can be admitted to vary the operation of a writing" Judgment was for the Plff. notwithstanding the mistake. — But on petition of the Dft. the Superior Court as a Court ~~as a Court~~ of Equity issued an injunction against the Superior Court, as a Court of Law.

If a mortgagor covenants that he will not apply to a Court of Chancery to be relieved against a foreclosure, if the mortgagee sues for a foreclosure, Chancery will grant an injunction to stay proceedings notwithstanding the Covenant, & if a Suit at Law is brought on the Covenant, an injunction to stay proceedings in this suit will also issue.

1 Ran. 489. — A Court of Chancery will relieve against frauds; so

They will grant an injunction on suggestion of fraud to stay
2 Com. 48. proceedings in a Court of Law.

Chancery will issue an injunction against an Ex^r.
Gho. Rep. 93.
2 Bac. 410.
1 Sid. 179.
1 Fonb. 68.
1 Kel. 683.
forbidding him to act as such, pending a suit respect-
ing the Executorship. –

Injunction in favor of authors, against
1 Fonb. 30.
2 Com. 53.
3 Bar. 174.
2 Show. 258.
1 Ver. 120.
1 P. 275.
Amb. 164.
such as attempt to republish their works, were frequent, even before
the Statute of Anne. This Statute has given authors a legal
redress in these cases. –

It was however the opinion of Lord Mansfield &
4 Burr. 409.
2417. –
two other Judges, that an author has an exclusive right to his works
at Com. Law. In the house of Lords 8 Judges were of opinion that
the remedy at Com. Law taken away, by the Statute of Anne
Five contra. —

The English Court of Chancery have lately issued injun-
Broch. 261.
1 Bro. P. C. 226.
Atk. 474.
1 Bl. 671.
tions to prevent a party from multiplying suits, by repeatedly
bringing actions of Ejectment for the same cause. For as the Court
of Law in which this action is pending in Eng. are fritterous, numberless
suits might be brought on the same cause of action, if there
was no such interference. —

In Com^n. as the proceedings in Ejectment are not fritterous no
such interference is necessary. —

This power of Chan. to issue injunctions has been exercised
in criminal cases. But the Courts will interfere only in cases
2 Atk. 312.
peculiarly circumstanced. If when there is a contested right
2 Bro. 64.
between parties, & law makes it criminal to invade that
right, a prosecution be commenced under that law, Chancery

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will issue injunctions to stay proceedings, till the right be decided. So where it appears that the right is soon to be tried in a suit pending in a Court of Law.—

In Great Britain, the power of Chancery is exercised over all the Courts in the Kingdom. In Connt. an injunction never issues against a Court of Probate; because an appeal lies from every decree order or sentence of that Court to the Superior Court as a Court of Law, and not as a Court of Chancery.

Power of Chancery in other Cases.—

In Eng. Chancery has jurisdiction of the payment of legacies. The principle upon which Chancery will compel the payment of legacies, is that the Est. is a trustee to the legatees, & that wherever there is a trustee, Chancery will compel him to execute the trust.—

In Connt. legacies are by Statute recoverable in Courts of law, & they adhere strictly to the rule, that where an adequate remedy can be had at law, Chan. will not interfere. Our rules in Chan. are generally the same as in England, unless where our Statutes have given the Courts of Law concurrent jurisdiction.

It is a rule in Chan. that whatever is agreed to be done is considered as done from the time which it ought to have been done. Thus if a man in his Will directs land to be sold & turned into money which he does not bequeath in legacies, Chan. will compel

1 Ch. 522.
2 do. 191.
3 do. 211.
1 Ch. 542.

a sale of the lands & distribute the avails as personal property, & vice versa. — But this rule must be taken with one qualification.

1 Ch. Cas. 471. 2 do. 679. 3 Atk. 254. 1 Salk. 154

If a man devises land to be sold for a particular purpose, & the avails of the sale are more than sufficient to answer that purpose, the residue is considered as reverting back to the heir at Law.

If there are no provisions of Statute to the contrary, it is incident to Chancery where lands are devised by will for the payment of debts, to compel a sale on a bill filed against the trustee. At Common Law if the Exr. & heir refused to sell, in this case the creditors were left without a remedy. —

If an Exr. refuses to accept the trust where lands are devised to be sold, ut supra, Chancery has the power of appointing another. And the avails of the sale will be ordered to be brought into Chancery, & distributed among creditors, pari passu. The principle upon which Chancery interferes in this case is that the Exr. or whoever accepts the trust, is a trustee. —

Ch. Comm. The Courts of Probate may direct the Exr. to sell where lands are devised to be sold for the payment of debts, & if he refuses he forfeits his bonds. Yet if lands are devised to be sold, ut supra, by some trustee, other than the Exr., & he refuses to execute his trust, Mr Reeve supposes the remedy to be in Chancery: for the Court of Probate has no authority over such trustee; since he does not give bonds to the Court. —

3. Chancery has power to compel an Equity of redemption. The Equity of redemption is unknown to the Common Law. In the Statute in case of a mortgage, is considered absolute in the mortgagee by forfeiture; but it is otherwise in Chancery.

Powers of Chancery.

Hence Chancery will order a sale of a Equity of redemption, for the payment of debts on the ground of a trust. —

In Comm.t an Equity of redemption may be alienated in the life-time of the mortgagor, & after his death it goes into probate with the rest of his Estate; hence in this instance we have no need of the interference of Chancery. —

4. Another power of Chancery is that of marshalling assets.

In England only the personal Estate of deceased persons is liable for the payment of their debts, except debts by judgment and specialty. The specialty creditors by judgment having a preference to others, may exhaust the personal fund, by which claims of an inferior rank are entirely defeated. — But in these cases Chancery will let in the simple contract creditors to the amount of the personal Estate taken by the specialty creditors. —

If the specialty creditors come upon the real Estate when the personal fund is sufficient to satisfy all claims, the heir in Chancery may compel the Ex.r to refund him, the same sum which the specially creditors have taken from the real Estate. — The Ex.r in this case being considered as trustee to him.

5. If one gives an estate in trust to — A for B, — A must execute his trust according to the circumstances of the ca.e. If it appears from the fe. that the donor or grantor intended that the Estate should, lapse at a particular time, when that time comes & not before, Chancery will compel conveyance. So if it was intended that the estate sur.e should have any particular intent. — In these cases the design of the grant

will be executed in Chancery whatever it may be. This beneficial interest the cestuie que use shall always have, & the trustee cannot deprive him of it. Yet to this rule there is a exception: If the trustee ~~but~~ conveys the Estate holden to a bona fide purchaser, the latter will hold, for it is presumed that he is ignorant of the trust, otherwise indeed he would not be considered a bona fide purchaser.

In Lond: there can be no such exception, since we have public records that are conclusive evidence of title.

In case of implied or private trust, where by reason of the Statute of Frauds no remedy can be had at law against the trustee: Chan. will enforce performance of the trust, if proof can be procured by the confession of the trustee; by circumstantial testimony &c. Thus if A employs B to sell Land for him & makes out a deed of the Land to him, B — the latter refuses to sell but retains the deed: or if he sells & refuses to pay over the money; Chancery will consider him as trustee to — A. — This is an implied trust arising without writing, & may be proved by parol.

2 Pow. 255, Pow. M. 65. 1 Ven. 356. 2 do. 1. 288. & Comb. 60. 1 Atk. 386. 2 do. 130. Comb. 409.

It is sometimes said this is making a parol agreement respecting Lands. — But this is not true; It is making an unavoidable inference from facts. —

There is one exception to this rule, where a man takes a deed of Lands for his wife. 2 Ven. 61. —

Fraudulent trust is not regarded in a Court of Chancery; the estate cannot be recovered after it is conveyed. —

2 Ven. 683.

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6. Chancery has power to grant what is called a bill of discovery; by which a party to a suit at Law, who has not legal evidence, is enabled to discover other evidence.

After discovery that the opposite party knows the facts which are wanted in evidence, if the case to which the facts relate is proper to be sustained in Chancery, the Court will sustain it if the party petitioning desires it. but if the case is proper to be tried at Law, Chancery will in some instances sustain it and in others not. - J. Reeve observes that he has not been able to find any general rule of discrimination ~~upon the~~ between the cases. —

1 Ch. W. 406.
2 Atk. 630.
1 Bro. Ch. 194.
3 Atk. 262.
1 Ves. 521.
2 Bro. 61.

7. If an agreement is denied in Chancery and an issue directed, that Court will reserve the Equity arising from the facts found & make a decree accordingly.

2 Bro. Ch. 216

In Consist. Chancery appoints a committee, & does not send the issue into a Court of Law to be tried by a Jury; for here witnesses may be introduced & examined viva voce. Otherwise in England. —

8th. On a memorial presented to Chancery they will appoint Commissioners to take depositions; But the memorial must shew that there was more than ordinary cause for the proceeding. as that the witness was aged sick &c. —

Formerly the same practice prevailed in Conn. but now, but now application may be made to a Court of Law. —

9. Court of Chancery have the power of ordering a person to resign evidence of debts after they have been paid, but not cancelled or given up to the obligor. They have also power to order evidence of title to be given up, when it becomes improper that

2 Wash. 397.
3 Atk. 397.
1 Ves. 570.

the holder should retain them, as in case of mortgage, when the debt secured by it is paid by the mortgor. —

In Connecticut deeds take effect by being recorded, the mortgagee therefore may be compelled to reconvey on receiving payment. — The reason why a man was compelled formerly to go into Chancery when his deeds &c were lost, was that in an action at law, upon a written contract or agreement, the Pltff. may make proofs of it; when the deed was cancelled or destroyed by the opposite party, there was indeed another reason; for the fact that the deed was cancelled &c by the opposite party was in most cases known only to himself, & courts of law cannot appeal to the conscience of the party. —

But now both in Connecticut & Eng. an action at law may be brought on such instrument, tho' it be lost, & the contents can be proved by other persons; & it may be averred that the instrument is lost tho' time and evident. —

3 Atk. 17.
1 Vez. 392.
2 Atk. 613.
1 Bro. Ch. 218.
3 Ban. 151.

The party still in Eng. can go into Chancery, but not in Connt. — For we adhere to the rule that where an adequate remedy can be had at law Chancery will not interfere. —

10th. Another power which Chancery exercises in Eng., is that of compelling joint-tenants coparceners &c to make partition. How Chan. become invested with this power is uncertain. Mr Reeve supposes that it might originate from the circumstance of one tenant's having taken possession of the title deeds &c in which case the other would have no remedy at law, or as each tenant owns the whole estate, Chancery may have considered each tenant as trustee to the other. — However they

became invested with this power, they now appoint commissioners to make partition, whose acts are binding on the parties. —

In Court the parties never go into Chancery. But the Sheriff appoints three men, whose acts fix the title, without ever making returns to the Court. — This depends wholly on practice.

11. Chancery will in some instances relieve against mistakes in instruments, as if different words are used in the writing from what were intended by the parties. But if the words used are those intended, Chancery will give no relief, tho' the words have an import at Law, different from what the parties really intended. Parol proof is admissible to prove the intent. —

12. When the instrument is defective thro' want of proper form, Chancery will relify, if such interference does not affect the rights of 3 persons — as if a deed have but one witness. — There has been no case where Chancery has ~~[illegible]~~ interfered in favor of mere volunteers. — Non. Deeds are required to be recorded. If a grantee thro' fear that the Estate will be attached, delays to procure his deed to be recorded, the estate has nevertheless passed. may be attached. — here Chancery will compel a grantee under a suitable penalty to procure his deed recorded. Tho' if he is a bankrupt and cares not for penalties the Court will record its proceedings which will complete the title.

13. Chancery has the power to protect the separate property of men and women. The practice of Femes Covert having separate property, has grown up within a Century. But now

1 Ch. 2, 5.
2 Ch. 422

the husband is a mere stranger to the sole and separate property of the wife; & if he invades her rights she may have a sole remedy in Chancery. —

Bonds by a man before marriage to his intended wife are enforced in Cha. after marriage. In other cases also, where the remedy at law has become extinct, by the union of the rights of obligation, Cha. will enforce the Contract as where a testator's debtor is made Executor. —

Pre Ch. 22. 2 Pow. 255. 2 Ven. 493.

All articles of agreement entered into by husband and wife for the purpose of separate maintenance, are cognizable by Cha. A husband may convey an Estate to a 3d person to the use of his wife, & Chancery will compel the trustee to execute the trust. But now by an Eng. Statute, an Estate conveyed to a trustee to the use of another, vests absolutely in the latter. — Mr Reeve sees no reason why a man may not convey directly to his wife. —

When one enters into a bond before marriage, conditioned to leave a certain sum to his wife, after his death, this is good as a bond both in Chan. & at law. —

2 Ch. Ca. 480. 2 B. & W. 243. 2 Atk. 97.

Contracts between husband & wife have been enforced in Chancery. — Mr Reeve supposes that all important contracts are good without the interference of trustees. —

1 Atk. 270. 2 B. & W. 334.

If a husband borrows money of his wife, she is a creditor in Chancery after his death. —

2 Ven. 87. 1 B. & W. 264. 2 Bro. C. C. 201.

14. Some contracts are capable of being affirmed and others not. The rule is this: If the contract has been set aside as unlawful, it cannot be affirmed, otherwise it may be, unless the rights

1 Atk. 354. 1 Ver. 75. 2 Ch. 75.

Powers of Chancery.

of 3d persons are affected.—

15. Courts of chancery have taken it on themselves to relieve against the lapse of time. There they grant relief where a man thro' accident has been disabled to perform his contract by the time limited. So they have relieved even in cases where there was some degree of negligence — as where a man was to pay a sum of money by a day certain, failed of procuring the money for that purpose till a week before hand, & then fell sick. — & are enters into a conditional agreement, that if another person pay by a certain day he will convey, otherwise the agreement to be void, & takes a Note of hand Chancery notwithstanding the agreement thus conditional will compel a conveyance, whenever the Note is collected.

16. When a controversy cannot be settled at Law without a multiplicity of suits, as in matters of account, concerning which there has arisen a number of disputes Chan. will take up the whole controversy, & make a final settlement. — The remedy at law is not deemed adequate, in cases of this kind, since the expence of a number of suits would ruin the parties. ~~A bill of~~ The bill brought in Chancery in this case is called a bill of peace — A bill of peace has been brought in our Court of Errors, but never in an Superior Court. —

2 Vern. 261. Vern. 28. 308. 266. 3 Bac. 174. 2 Raw. 217. 1 Vern. 189.

17. At Common law bonds are not negotiable, but Chan. will protect the assignment. — as in Court where Notes are not negotiable. — 2 Ray. 683. — 2 Vern. 540. —

18. — A Court of Chancery will decree the performance of an

award, on the ground of an agreement to abide by it. This rule obtains to prevent litigation, tho' personal property be
2 Ven. 24. the subject in dispute. — 3 P. W. 187.

19. Where one of two partners dies, an action which would have lain against both, had not been living must be brot. against the survivor. And if both parties be dead the Ex.r of him who survived the other is liable. Yet if the last ~~partner~~ partner died a bankrupt, Chancery will give a remedy against the Ex.r of him who died first. In Eng. application is always made to Chancery in this case. Formerly it was so in Connecticut. But has lately been resolved by the Superior Court that an adequate remedy may be had at law. It is necessary to state in the declaration ~~the~~ circumstances, shewing the propriety of coming upon the Ex.r of the ~~partner~~ partner who died first.

20. Chancery will order an offset when otherwise injustice would be done — as where a person is sued by a bankrupt, there being mutual debt & credit. — In Connect. the remedy in this instance is in Chancery. But in
4 Sum. 123. Eng. Courts of law will order a set-off under the
Bl. 304, 5 Statute ~~second~~ of 8 Geo. 2d — 2 Bl. Rep. 440. — 6 Term. 456.

+ 21. It is a rule in Equity that when one asks Equity, he must do Equity; & therefore when one asks a specific performance of a contract he must shew that he has performed ~~on~~ his part. So strict is this rule that when it becomes impossible, for one to perform by inevitable accident Cha. will not interpose. But if after part performance a total

performance becomes impossible for one to perform Ch. will interfere. If it becomes impossible to perform in toto his part performance is lawful, Chan. will decree that the party perform in part only.— 3 Bro. P. Ca. 339.—

Ves. 87.

22. If there be a contract about land, which at the time of making it was good, & substantial doubts respecting the title afterwards arise, Chan. will leave the decision to Law. but if the title is probably good, Chan. will decree since a decree of that Court does not alter the title.—

2 Atk. 19. 20
2 P.W. 199.

23. A vendor from the time of making the agreement is considered as a trustee to the vendee & vice versa, tho' the agreement wants some formalities. for whatever is agreed to be done is considered in Chan. as done from the time at which it ought to have been done.— In Eng. every bond Creditor is considered as having a lien upon the land of which the debtor died seized. But if the debtor in his lifetime had articled to convey Chancery will not consider him as having died seized, on the ground of the general maxim, often repeated.—

3 P.W. 215.
1 do. 7 10.—
10 Mod. 468.
4 Bro. P.C. 7.

A question of great importance is, whether in case of a loss after an agreement respecting the sale of property, the vendor or vendee shall lose it.? If the maxim that whatever is agreed to be done, is considered as done not as time, in this case, there can be no doubt as to the decision of Ch. in this instance. There has however been a variety of opinions on the subject

2 Ven. 280.
1 P.W. 261. 61.
1 Bro. Ch. 156.
2 P.W. 280.
2 Bro. Ch. 69. 70.—

Analogous to this would be the decisions in a Court of Law in certain cases. If A agrees to sell a horse to B when B should produce the money in payment, both engaging

to perform, the property of the house is held in law to be transferred. This point was first settled by a decision in the 18th Edw. 3, which decision has never since been controverted. A distinction is however to be taken between this case & those cases where it is left optional with the parties, whether to perform or not. —

Notes taken by — & C. — & Continuation of the Powers of Chancery —

Land ordered to be sold, is considered and treated as money, & will go to the Exr. — 2 Pow. Con. 83. —

2 Ath. 154.
1 Forb. 414.
2 Ves. 637.

The property being considered as transferred, the vendee shall suffer the loss if any happens. — The parties are bound from the time of the agreement, ie the property is considered as transferred from the time of the agreement, so far as that if a loss happens after the agreement entered into, & before it is to be executed the loss shall fall upon the vendee or Covenantee. This rule appears to be well established. —

1 P. W. 61.
2 Pow. Con. 64.
2 Pow. D. 160.
1 Ves. 437.
Bro. Ch. 156.
2 P. W. 217.

When the agreement is not an agreement of sale, but merely an agreement to stipulate at some future time the property is not bound from the time of the agreement where a loss happens. —

2 Pow. Con. 79.

In case of a tenant in fee of the money, it will be considered as money, unless he shows his election to consider it as land. — 1 Bro. Ch. 223. —

2 P. W. 175.
3 do 121. note.
3 Ath. 256.

Powers of Chancery.

The presumption that the tenant in fee intended it should be considered as land may be rebutted. 2 Bro. C. 106. 117.

2 Ch. H. 174
1 Ch. 485.

A court of Cha. will not always decree a specific ~~eq~~ performance of an agreement where they have cognizance of the subject matter — The want of mutuality is a decisive objection to a decree of performance thus: where one agrees to convey, but the other does not agree to accept, here the agreement is on one side & therefore will not be enforced. — But the want of mutuality is no objection at Law. — 1 Bro. Ch. 106.

2 Ver. 415.
1 Eq. ab. 20.
2 Bro. P. Ch. 415.
10 Ath. 10.

In case of penalties, if the party does not waive the penalty in a bill for specific performance, the party may safely demur to it. — A court of Cha. will not enforce the penalty where the substance of the agreement can be obtained without it. — There can be no ~~rule~~ of compensation where there is no rule of damages furnished by the contract ~~nor~~ ~~there cannot of~~ Where the penalty is in the nature of ~~liquidated~~ damages ~~there~~ the court will not relieve against the penalty.

x

If the substance of the agreement cannot be obtained without enforcing the agreement, Chan. will enforce it, notwithstanding there is a penalty, which might be recovered at law.

1 Mad. 112, 13.
1 Ven. 68, 69.
1 Fonb. 387.

If a creditor agrees with a debtor, that if he will pay within a certain time, that he will accept a less sum, & the debtor does not pay within the time limited, a Ct. of Cha. will not relieve agt. this penalty.

1 Ver. 220.
Pw. Co. 160.
Dam. Dist. 481.

Courts of Chancery.

When a Ct. of Cha. will relieve ag.st the penalty, they will always enforce a performance of the agreement. — Where the Ct. will not relieve ag.st the penalty, they will not relieve ag.st enforce a specific performance of the agreement. — The rule of Com. Law is, that the party may pay the penalty or perform the agreement. — 2 Ath. 371. If A enters into a bond to the amount of $1000 to convey land, it is not competent for him to say in a Ct. of Cha. on a bill for performance, that he is ready to pay the $1000, for the agreement is considered as the substance of the contract. — But where the penalty is in the nature of liquid damages, the Ct. will not relieve against the penalty — If it is in the nature of a penalty in terrorem the Court will relieve against the penalty. 4 Burr. 2228. In Eng. the Court of Chan. never find the damages but direct an issue of quantum damnificatus to be tried at law. — The Ct. will not vacate a contract merely because it is unreasonable. 5 Viner 529. — 2 Eq ca Ab. 28. — Chancellor will not interpere in such cases but will leave the party to his remedy at law. —

1 Bro Ch. 171.
2 Pas Con 136.
1 Bro Ch. 414, 5
1 Fonb. 141.
Sha. 533
2 Ver. 528
4 Burr. 2220.
2 Burr 2220.
6 Bro P. Ca. 417.
470.
2 Vern. 32.
2 Vern. 119.
1 H. Bl. 227.
Show P. Ca. 20.
2 P. Wms 203.
3 do 290.
2 Pas Con 145.

Contracts obtained by improper hardship & oppression a Ct. will not enforce but vacate it. — Improper hardship & oppression is where undue advantage is taken of the party's situation. It sets aside the agreement so far forth as it is oppressive. — This agreement is not absolutely void but voidable only. of course it may be ratified when the party's relieved

Salk. 449.
2 Pas Con. 163.
10 P. W. 727.

Ves. 152. from his circumstances. 2 Pow. Con. 148. —

5 Ath. 383. 1 Ven. 227. 229. A Court of Cha will never decree a specific performance where there is any thing unfair in the conduct of the Plff. The maxim in a Ct. of Cha. is that he who seeks equity must do equity. A suppressio veri is as much fraud as a suggestio falsi. — 5 Ven. 553. — Unless the Plff. has conformed to the rules of strict justice the Ct. will not interfere in his favor. — In some cases where there is a mere misconception, the ~~parties~~ Ct. will refuse to decree performance — this would be no objection against a Ct. of Law's giving damages.

1 Bro. Ch. 440. Re Ch. 539.

2 Bro. Ch. 325. 2 Pow. Con. 225.

If the mistake were the cause, or sine qua non of the agreement, the Ct. will vacate the contract or set it aside. — as where there were 3 brothers — A, B, & C. A supposes that C ~~was~~ the youngest would be the heir to B because he had been informed by a schoolmaster that lands always descend & never ascend — & therefore makes an agreement with C to let him have a part of the lands & keep a part himself — now A's being under this mistaken apprehension the the Ct. set aside the contract the the misconception being the sine qua non of the agreement

2 Pow. Con. 126.

The compromise of a doubtful right is a sufficient consideration on which to decree an agreement. — This is where the parties are not deceived but contemplate the doubtful right at the time of the agreement. — they intentionally make a bargain of bargain both are

1 Ath. 10. B. H. 726.

willing to abandon what he supposes to be his right & accordingly does
2 Atk. 527. 592. abandon. — 2 Pow. con. 261. — 1. do 142.

Where there is coercion or duress the Ct. of Cha. will
1 P.W. 118. 2 Atk. set the Contract aside. — 2 Pow. con. 189.

But where there is due respect paid to a Parent his influ-
1 Ves. 19. 1 Atk. 11. ence will be no ground to set aside the agreement. — 1 P.W. 639.
3 Ch. 369.

Intoxication will be no ground to set aside the agree-
1 Pow. con. 29. ment, unless some unfair advantage has been taken. —
3 P.W. 130. 1 Ves. 19.

Weakness of mind is not sufficient ground to set
3 P.W. 129. aside the agreement, if the party is legally compos mentis.

Contract which in some instances are not binding upon Infants at
Law, will be enforced in Cha. if it is for the Infants ben-
1 P.W. 558. efit. But this is a discretionary business with the Chan-
5 Mod. 368. 1 Atk. 387. cellor. thus where a person lent money to an Infant to pur-
1 Fonb. 68, 9 chase necessaries, he was allowed to stand in the shoes of
the person who sold the necessaries. —

Contracts which tend to
defraud 3d persons will be set aside. — such are marriage
brokage contracts. A Ct. of Cha considers these contracts as
illegal & void. —

Fraudulent contracts shall be set aside
1 Eq. ca. ab. 88. Sch. 156. where it will defeat the intended fraud. But if enforcing
1 Ven. 48. 475. them will defeat the fraud they shall be enforced. It is
Ves. 503. 2 do 375. impossible for the parties to ratify the contract in these cases.
2 Pow. 176.
1 Ven. 602. 475. 1 P.W. 496. 3 do 75. note. —

Contracts made with the heir

apparent for the purchase of his expectancies are always set aside in Chan. on the ground that it tends to seduce him from a proper line of conduct; & induce extravagance & dissipation. It makes no difference whether the heir apparent is a minor or an adult. If the heir in such a case conveys away the land in pursuance of the agreement after the death of the ancestor, it will be set aside, unless the heir had full knowledge of his right to avoid the contract & it was done fairly. —

2 Ca. 44.
2 7.
3 P.W. 292.
1 P.W. 320.
1 Wilb. 320.
2 Rawlins 124.

A Ct. of Cha. has the power to make a set-off, which cannot be done at Com. Law. But by Stat. Geo. 2d. it may be done by a Ct. of Law. A set-off will not be decreed in Cha. unless the party is in insolvent circumstances. — 2 Bl. 440. —

3 Atk. 304.
4 Ven. 123
Cowp. 56.

A Court of Cha. will not regularly interfere in cases of personalty, but where one is wrongfully possessed of the title deeds of another Cha will decree them to be delivered up. —

2 Atk. 307.
Mad. 297.
1 Ven. 479.

Our Superior Court sitting as a Ct. of Cha. think themselves authorized to decree where the sum in demand exceeds $1600, unless an ~~exception~~ exception is taken to their jurisdiction — If the sum in demand is uncertain the alleged value shall decide the jurisdiction of the County Court sitting as a Ct. of Chancery.

2 Root 42
Stat. Com. 130.

Where the object of a bill is to recover nothing more than a sum of money the Ct. will not interfere, but leave the party to his remedy at Law —

Points of Chancery.

A settlement made before marriage in consideration
1 Eq. cas. Ab. 24. thereof, is good against every one; if after marriage a
1 Ver. 450. settlement be made in consideration thereof, it is volun-
tary, & fraudulent against creditors, who were so at the
time, but not against those whose demands are of a poste-
Amb. 121. rior date, if the settler were then in solvent circumstan-
2 Bro. 92. ces or not engaged in trade. —

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Criminal Law.

Of Public Wrongs,

or

Crimes and Misdemesnors.

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4 Bla. Co. 2 — This branch of the municipal law which treats of public wrongs is called "criminal Law", pleas of the the Crown, or Crown Law.

The term, "Public wrongs, includes all crimes and offences against Municipal Law — 4 Blac. 1. —

A crime or misdemesnor is an act committed or omitted in violation of a public law, forbidding or commanding it. see 4 Bl. 5.

4 Bla. Co. 5. — Crimes and misdemesnors are strictly synonymous, though in common acceptation, the former denotes offences of the more atrocious kind; and the latter those of a less heinous character. — The difference between crimes and civil injuries, is, that a crime is an infraction or violation of a public right, inherent in the whole community considered as a community. A civil injury is the violation of a private right, vested in an individual, considered as an individual —

In almost every case, a public wrong actually includes a civil injury, or a public and private offence; As a battery, libel, murder, theft, robbing, and the like

4 Blac. 5. 6. 7. And in every case it may include or produce such an injury; for so far as an individual is injured it is a private wrong; as an instance, in a public nusance; but the principle offence is the public injury. & in all these cases the object of the law is, to give, as far as possible, a two fold redress. That is, a redress to the public and to the individual — But this rule, as with regard to nusance, does not always hold, for should no individual sustain any damage by such public nuisance, it is not then a private injury; ...

One act may constitute a number of offences; and on the other hand one offence only may arise out of a number of acts no man can be twice punished for the same offence, but he may for the same act. as an offence of a higher nature may arise out the same act. Therefore when the Public prosecutes for an offence it is not material how far the individual has sustained an injury; — Thus if the offence amounts to felony, the private injury is regularly, at common law merged in the crime and no private redresses can then be had as of Treasons, murder &c. and the reason is, the policy of the Law; the object of which is to prevent offenders from escaping punishment. —

4 Blac. 5. 6. 2 Hawk. 873. 2 Ld Ray. 1572. But the only true and rational foundation of this doctrine of merger seems to be, that the punishment for the public wrong, renders it impossible for the offender to make reparation for the civil injury, it being in general a forfeiture of the life and property, and having forfeited his all, surely he cannot repair —

1 Blac. 5. 6. 2 Roll. 557. 1 Mod. 283. Com. 582. Bull. 131.

3 Ter. R. 176.

Public Wrongs

Blac. 6. If a Crime, not amounting to felony, injures any individual he has his remedy; and the offender liable to an action brought by the individual; for the public offence does not in this case hinder him from compensating; as in battery, libel, nusance &c for here the punishment being less severe than in the cases above stated, leaves room for compensation —

In Con^l the doctrine of merger seems not to have been regarded; Civil suits have here been sustaind for perjury and Arson; there has been a forfeiture of property for crimes in two cases only, viz. destroying magazines &c of the United States, in time of peace — and for Manslaughter. in neither of these cases however, is life forfeited —

The right of punishing for crimes is founded upon the law of Nature and in some instances it is authorised by the revealed law of God also, as in the case of murder — Must then the law of nature be violated with impunity here? no: who then is to inflict the punishment due. why clearly the person injured — Therefore, in a state of nature, the right of punishing the offender was vested in every individual; for otherwise, there would be no execution of the law and therefore no sanction for it. — But how then does the civil society have a right to punish? — In a state of Society, the right to punish is transfered to the sovereign power from the individuals, and is derived by the express consent of its members; here then, men are no longer their own judges or avengers —

4. Blac. 7.

4. Blac. 8.

Public Wrongs.

4 Blac. 8. 9. Society's right to punish then, is derived from the consent of its members either express or tacit, and therefore is said to be founded on compact — This foundation is broad enough to authorise many punishments, but not all — as in capital crimes, called mala prohibita. But it is otherwise as to mala in se, for the individual who had a right to punish in a state of nature has a right to transfer it — see Paley's Moral Phi. 341. The consent of the criminal is in no case sufficient to authorise capital punishment — But the most rational ground upon which society has a right to punish not only in cases of mala prohibita, but in all offences, is necessity — or expediency. Society must then make laws for its own preservation and enforce them or it cannot exist. as in the case of treason, shall it not punish treason? for it has a right to defend itself as much as an individual, therefore it has a right to inflict that punishment which is necessary to this end.

Vattel Prel. 1. 7. 8.
1 Hale. 13.
4 Bl. 9. 10
Paley. 349.

A foreign State, though regarded as a moral person has attributes different from those of a physical individual; different rights, duties & in nature & sence

The end of human punishment is the prevention of crimes. This end is to be obtained in one or more of three ways. 1. In such a way as it may reform the offenders. 2. By depriving them of the power of doing future mischief 3 By such punishment, as will deter others, by the example. Punishment to reform is confinement, chastisement &c. punishment to prevent future crimes is death &c. all which serve to deter others.

4 Blac. 11.
2 Paley. 434.

Vattel 74.
2 Burlamaque 142.
4 Blac. 9.

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II Of Persons capable of committing crimes.

1 Blac. 20. Regularly all persons are liable to punishment for disobedience to the laws excepting such as are expressly exempted. All the excuses which protect them from punishment are reducible to this single consideration, viz, the want of will or the defect thereof. To constitute a crime there must be a will and an act concurring, no man is criminal unless his mind is criminal. Nemo reus, nisi mens sit rea. for the will must concur with the act. But in Trespass considered as a civil injury it is otherwise. A Defect of will is in three cases.

1 The mind may be said not to concur with the will where there is a defect in the understanding: and the law will not annex any crime committed by such a person.

1 Blac. 22. Thus Infants under the age of discretion unless malice or cunning appear in the act, are not capable of distinguishing between good and evil: is not punishable by any criminal prosecution in any case; He then who is not a moral agent can't be guilty of any criminal act.

If the offence consists in omission, Infants are not generally punishable at common Law even tho' of the age of discretion. As the neglect of repairing roads, bridges & public places. but here the exemption is not from want of will but his legal incapacity.

1 Hal. 20. 1 Blac. 22

The age of legal discretion as the law now stands is fourteen years; under this age the presumption is in favour of the Infant. But as to all infants between the age of fourteen and seven, this presumption may

1 Hawk 2.
4 Blac. 23
1 Hale 27. 34.
Post. 72

in capital cases be rebutted; if under seven it cannot in any case be rebutted. This distinction is laid down by Blackstone in the case of felonies only — They not an infant under four can be punished for a breach of the peace riot and common misdemeanors. — 4 Bla. 22

4 Blac. 24.25.
3 Inst 46.
1 Hale 30.31.
43 & 65.
1 Hawk 2.

Idiots and lunatics are not punishable for their acts or sins under these incapacities. not being capaces doli it is otherwise with a lunatic at lucid intervals —

1. Hawk 2.
1 Hale 617.

If one commits a capital offence and before arraignment becomes insane, he cannot be arraigned; if after arraignment, then he cannot be tried; if after trial & verdict against him, he cannot recieve judgment; and if after judgement, he cannot be executed —

4 Bla. 24, 34. 370.
3 Inst 46.

If it be doubtful whether a prisoner is no compos mentis, the fact must be tried by a jury — With respect to madmen, when they commit murder, by the incitement of any one who is not insane or an Idiot, the rule is that he who thus incites him to an unlawful act is himself the offender - and the principal —

1. Hawk 3.
1 Hale 617.
4 Blac. 35.
Hetl. 53.

Voluntary drunkenness is no excuse, but rather an aggravation in committing a crime; in case of habitual debility of mind produced by a long course of drunkenness it is otherwise — So if the intoxication be not voluntary, but produced by force or fraud it is excusable — —

10 Co. Litt. 247. a
4 Blac. 25. a
1 Hawk 2.
2 Crow. 19. a
4 Coke. 125.
1 Hale 32.

2.nd There is a defect of will where the understanding, tho' sufficient does not exert itself - as if one commits an offence by chance, as in shooting at a thief he happens to kill another man; he is excused, for the will is neuter —

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4 Blac. 26. 1 Hawk 5. 800. 1 Hale 39. 4 Coke. 124. Keely. 129.

The general rule is that if one commit an unlawful act by misfortune or chance, he is excused for here is a defect of will — But if one in doing an unlawful act, does mischief which he did not intend he is not excused —

Plowd 343. 5 Ray 467. 1 Bur. 35. 1 Hawk. 5. 800 Cro Char. 538. Foster 42

Ignorance or mistake in point of fact is excusable; but ignorance in point of law is not. ignorantia juris non excusat. — in the former there is a defect of will. in the latter the will concurs with the act. and evidence will not be admitted to shew a want of knowledge in in point of law — Cro Char 538. 4 Blac. 27. 7 Ter R. 514. —

4 Blac. 21. 27.

3rd There is a defect of will arising from compulsion & necessity. here the will opposes the deed or at least does not approve of it. as if a law commands him to punish another. for if the legislature enacts an iniquitous law commanding an act contrary to religion or morality here the subject is excused in obeying, for he acts under the obedience of a civil subjection. 4 Blac. 28 —

10 Mod. 63. Keel. 31. 4 Blac. 28.

A Feme-covert is in many instances excused, where she does an unlawful act through the coercion of her husband, or which is the same thing in his company, as for theft & burglary. But if she commits these with her own accord voluntarily: or by the bare command of her husband she is not excused. or if she did in no way force her but rather tried to prevent: the circumstance of her being with the husband will not make her so. Uxor quæ non prohibet, cum prohibere possit, jubet is the law maxim — are not theft and burglary mala in se —

4 Blac. 28. 29. 230. & 241.

In the case of Treason Murder and it is said Robbery, even coercion by the husband, does not excuse the wife, and

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so likewise in manslaughter; & degree as to robbery — as the husband breaks the civil obligation by which he is a tied; the wife is not subject for the offence is of too heinous a nature, to commit by his order. —

2 Hawk 2d.
1 Bac. 294.
4 Bla. 76
1 Hale 47
4 Blac. 28.
3 Feb. 36.
Mod. 313.
1 Hale 45.
1 Hawk 5.

Neither a child nor servant, as such, is excepted for any crime by the command of the parent or master. —

Another species of compulsion working a defect of will is Duress per minas which excuses many unlawful acts. Thus, Treasonable acts are excused by compulsion of the enemy, or rebels. 4 Blac. 38. for he thus no use of his will —

1 Hale 50
1 Hawk 5.

But this holds chiefly with regard to positive offences only & not as to natural offences, as killing an innocent person to escape death. 1 Hale 51. —

4 Blac. 30.

Another kind of necessity arises from legal compulsion; the will is here passive. As where an officer of Law is bound to make an arrest, or disperse riotors and resistance is made, killing them is justifiable —

1 Blac. 31.

Stealing to relieve from extreme hunger &c. is not justified.

1 Hale 54.

Of Principals and Accessories.

One may be a Principal in an offence in two ways —

A principal in the first degree is he who is the actor or absolute perpetrator. A principal in the second degree is he who is present aiding and abetting the actual perpetration — according to Hawkins the offenders in the last case are principals in the first degree —

4 Blac. 34.
1 Hale 615
Doug. 197.
Ibid. 97.
2 Hawk. 321.
258. & 336.

The presence necessary to make a principal in the second degree need not be an actual standing by, within sight or hearing; a constructive presence is sufficient —

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Fost. 330.
Foug 197.
1 Blac. 34.

As in keeping watch or guard at a convenient distance to aid and assist the perpetrator —

Kelg. 52.
3 Inst. 138.
1 Hale. 617.
2 Hawk. 443.
and 315. folio.
4 Coke. 44.
9 Co. 81.

Even a constructive presence is not always necessary to make a principal in the first degree; As if poisoning poison and exposing it, whereby it is taken in the offenders absence. And placing a pitfall or trap, setting out a wild beast with intent to do mischief. here the offender is a principal in the first degree —

4 Blac. 35.

An accessory is one who is not the chief actor in the offence, nor present at its perpetration, but is in some way concerned in it either before or after the fact —

3 Inst. 138.
1 Hale 613
2 Hawk. 439.
and 440.
Co. Lit. 57.
12 Coke 81.

In high treason, there can be no accessories, for then all concerned are principals; and this is an account of the atrocity of the crime: Besides the bare intent to commit treason is, in some cases, actual treason even tho' no overt act be done —

4 Blac. 35.
1 Hawk 58.
2 Ib. 439. 440.
4 Inst. 318.
12 Co. 81.
2 Ry. 296.

Whatever will make an accessory in felony will make a principal in high treason. but as to accessories after the fact, it was formerly questioned — In general all felonies, except such as are unprecedentated admit of accessories — In petit larceny there can be none, nam de minimis non curat lex.

4 Blac. 36
1 Hale. 613.
2 Hawk 439.
Co Lit. 57.
Mod. 66.
1 Sid. 312.

Accessories may be in petit treason murder & other felonies, except those which in judgment are unprecedentated, as in manslaughter, in which there can be none before the fact.

4 Blac. 36.
3 Inst 139.
1 Hawk 132. 445.
2 Ry 128. 322.
Mod 91.
1 Hale 613.

An accessory cannot be guilty of a higher crime than his principal; As if a servant causes a stranger to murder his master or wife her husband, the servant ~~tho'~~ being absent is accessory to the crime of murder only; but had he been present, and assisting, he would have guilty of petit treason as the principal —

1 Hale 615. and the stranger would have been guilty of murder only.

Accessories are of two descriptions, 1st before and 2nd after the fact. — An accessory before the fact is one who procures, counsels or commands another to commit a crime — being himself absent at the time of the act committed, the absence is necessary, otherwise he is a principal —

4 Blac. 36. 2 Hawk 445. 1 Plowd 475.

He who abets another to an unlawful act is accessory to all that ensues upon that unlawful act; but not to any thing substantially distinct from it, and not directly ensuing upon it. Thus. A. commands B. to beat C. — B. beats him till he dies; here A. is guilty of murder as accessory — So A. commands B. to poison C. but B. shoots or stabs him. — A. is accessory. for Cs death is the substance or the thing intended. But if A. commands B. to burn Cs. house, and B. in doing it robs the house; A. is not accessory to the robbery.

4 Blac 37 1 Hale 617 2 Hawk 446. Plowd 475 Fost 370.

If the abettor retracts before the act done, he is not accessory. (2 Hawk 445. Fost 354. Plowd 475. 6.)

3 Inst 51. 1 Hale 537.

The bare concealing of an intended felony is said to be only a misprision of felony, which is punished only by fine and imprisonment. — What is misprision (4 Bla 119. 3 Inst 36. 1 Hale 127.) Persons who are accidentally present, when a felony is committed, and do not endeavour to prevent it, and to apprehend the felon are guilty of fine & imprisoned. (exception in favor of infanth (2 Hawk 1.)

2 Hawk 447 Modern C. 3 Inst 139. 142 4 Blac. 121. 2 Haw 115. Ney 50.

2nd An Accessory after the fact, is one who receives relieves, comforts or assists a felon, knowing him to be such. But assistance given, must be with intent to hinder public justice; as to prevent the

4 Blac. 37. 1 Hale 618. & 620 2 Hawk 448 204. 205. 188.

felon from being apprehended, tried or punished — Thus. by harbouring & concealing, furnishing with a horse &c. to escape; rescuing, assisting an escape from goal, by instruments; bribing the goaler &c. but to relieve a felon in goal with necessaries &c. no offence.

4 Blac. 38

Buying or recieving stolen goods, knowing them to be such, made no accessory at Com. Law. the offence was a mere misdemesnor; but now by statute it is otherwise in England. (5 Ann. 4 Geo 1.) By the Stat. Con. the reciever is made a principal.

1 Hale 620.
4 Blac. 38.
2 Hawk. 450.
Cro. C. 388.
Ye. 4. 4.
1 Roll 68.

Felony must be complete at the time of the assistance given, to make an accessory; as in the case of a mortal wound, assistance given before the death. —

2 Hawk. 451.
1 Hale 619. 622.
4 Blac. 38.

A wife as was observed is excused for assisting her husband tho' a felon. forbearance is presumed. but no other relation excuses; as parent, child, master. &c and even a husband is not excused in assisting his wife. a felon —

2 Inst. 188.
1 Hawk. 2 Ch. 451.
1 Hale 621.
4 Blac. 39.

By a General Rule of Common Law. Accessories suffer the same punishment as their principals — But accessories after the fact are now by English Stat. allowed the benefit of the Clergy in most cases —

2 Inst 188
4 Blac 39.

It was formerly holden that accessories could not be compelled to answer till the principal was attainted: tho' now the contrary is holden. that he cannot except by Stat. be tried, unless he desires it, till the principal is attainted, or unless the principal is tried at the same time. But now by Stat. of Anne. the accessory may be tried in certain cases, though the principal has not been attainted, or even tried — 4 Blac 323. 2 Hawk. 453. —

4 Blac. 323
2 Hawk 453.
4 Blac 40.

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If the principal is acquitted the accessory is also discharged; and if the attainder of the principal is reversed, that of the accessory is ipso facto reversed: but is otherwise, while the first attainder is unreversed, though it be erroneous. 2 Hawk 452. —

4 Coke 43.
2 Hawk 452.
1 Hale 623-4
1 Roll 777.
9 Cok. 119.

But the death, or pardon of the principal after attainder does not, even at Com Law, avail the accessory — tho' at Com Law, the death & pardon before attainder of the principal) tho' after conviction discharge accessory it is otherwise now by Stat. Anne, before or after —)

4 Blac. 323.
4 Hawk. 453.
Cro E. 541
4 Coke 43.
Ray 477.
Dyr 120.

If one is acquitted as accessory, he may afterwards be indicted a principal. but if acquitted as principal it is dubious, whether he can after be indicted as an accessory before the fact; (there appears no good reason why he may not be.) 2 Hawk 530). Tho' as accessory after the fact, he may be indicted —

4 Blac. 40.
1 Hale 625. 6
Foster 361.
2 Hawk 529. 30.

The indictment against one as accessory need not state that the principal committed the offence It is sufficient to state that the principal was convicted &c. and then to charge the prisoner as accessory (7 Term Rep. 465. 1 Hale 625.) yet it seems that the accessory on his trial, though it be after the conviction of the principal may controvert the guilt of the sd principal, either in point of fact or Law (2 Hawkins 456. 4 Blac. 324. Foster 121. 365).

Thus ends the lecture on principal and accessory given by Mr Gould and having treated on the several heads this subject continues next in order to lecture on Felony.

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Of Felony.

Felony is any offence which at Com Law, occasions a total forfeiture of goods or land, or both; ~~yet~~ the term is generical, (viz) not designating any one specific violation of the law; but a whole class of offences — otherwise it is of murder, manslaughter &c. —

4 Blac. 95.

The word did not originally denote any crime; but the penal consequence of certain crimes. it was synonymous with "forfeiture of a fee", or feud. it was afterwards used to signify the offence working the forfeiture and by an easy deflection, to denote offences working the forfeiture of goods only — —

Treason is strictly a felony causing a forfeit, anciently comprised under that name. but it is now clapped by itself, as a crime standing alone by general usage —

1 Hawk. 99.
4 Black. 94, 95. & 98.

Capital punishment is not necessarily a consequence of felony (tho' generally superadded.) As self murder and homicide by chance medley. also petit larceny. so, on the other hand some capital offences are not felony. as heresy at Com Law; standing mute, when arraigned or indictment — All felonies which are punishable with death work a forfeiture of all lands in fee simple, also of goods and chattels — others of goods and chattels only — 4 Blg. 97.

4 Blac. 237.
1 Hawk 146.
2 Bac. 476.
1 Hawk 144 and 99.
4 Blac. 95. 7.
3 Inst 43. —
Cok Lit. 391.
4 Blac. 381. 5.

But by general usage the word "felony" is now made to import a capital crime; and indeed to include all capital crimes below treason 4 Blac. 98 — Hence if a Stat. creates a new felony, the law implies that it shall be punished with death as well as forfeiture — —

4 Blac. 98. 1 Hawk 168. 1 Hal. 627. 641. 703 Cok. Lit 391. 2 Bac. 469. 2 Hob. 293. 1 Hawk 107. — Or, on the other hand if the Stat. annexes expressly a capital punishment to any offence, that offence is in construction felony — But if a Stat. prohibits an act "under the pain of forfeiting all he has" it is only a misdemeanor; for "no offence is made felony by dubious and ambiguous words" — 4 Bac 614. Co Lit 391. Hob. 270.

Crimes which in Eng cause a forfeiture are in Con: called felonies, tho no forfeiture ensues, — (exceptão).

4 Black. 373. 387. & 393. Clergiable felonies are those in which the benefit of the Clergy is allowed. This, in effect, is a kind of pardon, exempting felons even though convicted, from the punishment of death: but their goods are forfeited by conviction and cannot be restored. see 4 Blac. 365. and on — 4 Blac. 366. and 374. Ath Com. Law it was allowed in petit treason, and in most capital felonies, but not in all. not in high treason, nor petit larceny, or mere misdemesnors — The allowance in most capital felonies are sanctioned by Stat. 25. El. 3. 2 Hawk. 179. and extended to petit treason —

Originally this benefit of the clergy was allowed only to Clerks in orders, or the clergy. afterwards to every man who could read. for reading was evidence of his being a clerk. but never to women, they being excluded by their sex from the sacrical office —

2 Hawk. 176 2 Hale 372. 4 Blac. 365. and 369. 4 Blac 367. & 370. Do. 373. 374. 4 Low. by divers English Stat.s (especially Jac 21. 3 & 4. W. M. and 3 & 4 Anne) this privilege is extended in case of clergyable offences) to all persons whatever, readers or not) — But common persons are burnt in the hand or whipped or imprisoned or fined, or suffer some other inferior sort of punishment. but Clerks, peers & peeresses are not burnt &c.

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4 Blac. 373
2 Hale. 375.

But lay persons are entitled to the benefit of the Clergy but once; Clerks as often as they offend. i.e. as often as they commit clergyable offences: By its allowance for any particular felony, the offender is discharged forever, not only of that, but of all clergyable offences he has ever committed. 4 Blac. 374. —

4 Blac. 373.
2 Hale. 330.

At present in Eng. it is allowed in all felonies whether by Stat. or by com. law. unless expressly taken away by act of Parliament. — The Benefit of the Clergy was formerly pleaded in Eng. as a "declaratory plea", now it is prayed before judgment, after conviction usually — In Con[t] there is no such thing as benefit of clergy —

Of Homicide.

4 Blac. 177.
1 Hawk 100.
3 Bac. 661.
1. Hawk. 104.
111. 115.

Homicide is the killing of any human creature. Of homicide, there are three kinds. 1st Justifiable, 2nd Excusable and 3rd Felonious — 4 Blac. 177. —

Fost. 287.
2 Hawk 599.
Ib. 108.

Homicide therefore is not necessarily criminal; for the 1st kind has no guilt. the 2nd very little even in judgment of law. and only a nominal punishment. 4 Bla 177. 178.

I Of Justifiable Homicide. — —

4 Blac. 178
1 Hawk. 105.

Homicide is justifiable when occasioned by necessity as a sheriff in the execution of the duties of his office; when he executes a condemned malefactor. he is here under a Legal necessity — But in this case the Law must require the act to be done, and it must be done by the person required by law to do it, or his deputy —

1 Hale 497.
and 501.
3 Bac. 674.
1 Hawk 106

For if a private person voluntarily & wantonly kills a person attainted condemned & it is murder —

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4 Blac 178. 3 Bac. 674. 10 Cok. 76.b. 1 Hawk 105.130. 1 Hale 497.500. 5 Coke 106. Mod 333. Cro.C. 98. — The sentence must be by a court of competent jurisdiction. Thus if C.B. in Com Pl. give sentence of death, on a prosecution for a crime of which they have no cognisance, and it is executed; the officers who execute and the judges who condemn are guilty of murder — But if the court has cognisance of the offence and pass sentence of death when the offence does is not subject to it, the judges only and not the officer is guilty — for this is not coram non judice. —

Hawk. 106. 3 Bac. 674.

Homicide is justifiable in certain cases when committed for the advancement of public justice. As, an Officer in making arrest, is resisted and kills; dispersing riots &c. and this last holds private persons justifiable also. This justified by permission of law rather than command. So, if an actual felon resists or flies from his pursuers. even private persons without warrants are justified in killing them if necessary to prevent escape. —

9 Cok. 68. 4 Blac. 179. 3 Bac 674 Hawk 104. 1 Hale. 494. 1 Haw 106.

And even if an innocent person, indicted for felony resists &c, the Officer, having a warrant killing is justified. But it is otherwise if a private person without authority attempt to arrest an innocent person upon suspicion — Homicide is justifiable when an Officer attempting to make a lawful arrest in a civil case is resisted so that the deft. cannot be apprehended and so in many other cases — —

1 Haw. 107. 1 Roll. 189. Fost. 270. 3 Inst. 56.

Homicide is justifiable when done to prevent any forcible and atrocious crime. As when one attempting to rob or murder another and is killed by him. or as when one breaking a house in the night. But it is otherwise of crimes not forcible;

4 Blac. 180. 3 Bac. 675. 1 Hawk 108. 1 Hale 486. 493. 4.

Leb. 128. Fost. 275. 275. or unaccompanied with force, as picking pockets or the have breaking open a house in the day time —

1 Blac. 180. Fost. 273. Cro. C. 538. 1 Hawk. 108. 1 Hale 485 & on. 1 Hawk 113. 4 Blac. 184. 5. Homicide is not justifiable, in merely defending ones house goods or person from a bare trespass — though if the trespass is against his person it may be excusable se defendendo — if the trespass is against property only it is manslaughter. and if one kills another breaking his window to arrest him, in civil cases (suppose) — it is manslaughter — pray it not be homicide se defendendo; that is, if he cannot otherwise escape death or very great bodily harm. — This is the general principle; when a crime, in itself capital is attempted with force. the force is lawfully repelled by the death of the party. & here homicide is therefore justifiable — —

Blac. 185. — 4 Blac. 181. 1 Haw. 108. 110 Foster 274. 1 Hale 488. A woman may lawfully kill one who attempts to violate her chastity with force. So a husband or parent may lawfully kill the ravisher. and I suppose any other person may. 1 Hawk. 109. 3 Inst. 138. case of victors —

1 Haw. 105. 3 Bac. 675. 1 Hale 478. According to the old opinion, justification of homicide may be specially pleaded. later opinions are that it must be given in evidence under the general issue — it is however always agreed that an excuse cannot be plead.

Hawk 105 — for it is frivolous and evasatory as it does not amount to a denial of guilt. but merely a mitigation of it Justifiable homicide is not liable to punishment in any degree; not even nominally. indeed it were absurd, to punish what the law justified — see 4 Blackstone 182. and Hawkins P. C. 105 — next comes excusable homicide —

Public Wrongs.

II Of excusable homicide —

4 Blac. 182 — The difference between justifiable and excusable homicide is, that one is lawful, the other venial —

Excusable homicide is of two kinds. 1st per infortunium

3 Blac. 676. — by misadventure. 2nd se defendendo in self defence —

1 Hale 471. — the first is purely involuntary. the second is voluntary, but committed from motives, and under circumstances constituting an excuse —

1st By misadventure. this happens when one is doing a lawful act, without any design to do hurt, and involuntarily kills another — observe here, that the lawfulness of the act is essential. As if in using an axe the head flies off & kills one standing by. & so,

1 Hawk 111. 1 Hale 472 Fost 258. 4 Blac. 182. 3 Bac 476. — if a third person whips a horse and he runs and kills another. the rider is guilty of homicide by misadventure and the whipper of manslaughter at least —

1 Blac 182. 1 Hawk 111. Kelly. 65. Fost. 262. 5 Mod. 281. Skin. 668 1 Hale 454. 473 — A Parent moderately correcting his child and by accident kills him, or a master his servant. a schoolmaster his pupil &c. It is homicide by misadventure. likewise an officer punishing a criminal. it is excusable —

But if death accidentally ensues in consequence of an unlawful act, the author is guilty of manslaughter at least. & in some cases of murder. Distinctions.

3 Bac 476. 1 Hawk 112. Kel. 131. 4 Blac 183. 192. 1 Hale 472. 474. Fost 258. 292. — If the act is trespass only, it is manslaughter: if felony, it is murder. Stran. 499. Kel. 117. 1 Hawk 126. 7. 8 —

If one accidentally kills another in the execution of malicious and deliberate to do him personal hurt, it is murder. 4 Blac 200. 1 Hawk 112 Kel. 117. 1 Hale 39. 475.

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4 Blac. 192. 1 Hawk. 112. So if it be in consequence of any unlawful act which naturally tended to bloodshed —

So if one does an idle act which must manifestly endanger the ~~life~~ person of some one, and accidentally kills; it is manslaughter. As throwing stones at another in sport — this is an unlawful act. 1 Hawk 112. 4 Blac. 183.

Foster. 261. Hale. 481. 1 Haw 131.

But if death accidentally happen, in consequence of any lawful sport, as football, or vaulting &c it is then homicide by misadventure. 1 Hawk 112 —

Foster. 260.

2nd By self defence. se defendendo. this obtains where one in a sudden affray, kills his assailant in his own defence. this is excusable. It is distinct from that which is committed to prevent the perpetration of a capital crime. It is said not to be material who gives the first blow, if he who kills in self defence is forced to fight — But to excuse this kind of homicide, it must appear to be the only (possible, at least probable) means of preserving ones own life, or at least of escaping great bodily harm — (When it is to preserve ones life, it seems nearly akin to justifiable homicide committed to prevent an atrocious crime. 4 Blac. 183.) —

3 Bac. 677. 4 Blac. 183. 4

3 Bac 677. 4 Blac 184. 5 1 Haw 113. 108. Kel. 128. Fost. 273.

It is often difficult to distinguish this from manslaughter — The general Rule is. if both are fighting i.e. striving for victory, when the mortal blow is given; it is manslaughter. — but if the slayer has not begun to fight, or, having begun, tries to decline, and cannot without danger to his life, or great bodily harm, it is then homicide se defendendo, in defence of himself 4 Blac. 184. Fost. 277. ——

3 Bac. 677. 1 Hale 471. 3 Inst. 56.

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According to some, the aggressor himself, when pressed (ut supra) and trying to escape, is excusable in killing, to save his own life, but it is now holden the contrary — for it is his own fault that he brot himself to that strait.

1 Hawk. 113.
1 Hale. 479.
480. 482.
Kelg. 58.
Foster 276.
4 Blac. 185.
1 Hawk. 123
Kel. 129. 58.

2 If one strike with malice prepense, and having fled and tried to decline further combat, kills the other, in order to save his own life, it is murder.

3 If both agree before hand to fight a duel; and one being pressed (ut supra) kills the other he is not excused but it is murder. on account of the previous malice.

3 Bac. 677. 8.
4 Blac. 183.
1 Hale 445.
& 479. 1 Haw. 122
123. 2 H. 112.

4 The same rule applies to cases of fighting in general, by a preconcerted agreement. where its not a continued act of passion. 1 Haw. 125. 122. 112 Kel. 17. —

1 Hale 439. 475.

5 So the seconds of him who kills in a duel are also murderers; and according to some the other seconds are

4 Blac. 199.
1 Haw. 121.
1 Hawk. 514.
1 Hale 445.
3 Bac. 669.

6 This excuse of self defence extends to the civil and natural relations. as husband & wife. Parent & child, Master & servant. The act of relations is construed the act of the party; ~~as to prevent a rape killing him~~.

4 Blac. 186.
1 Hale 484.
3 Bac. 673.

Suppose A. & B are fighting, and A. is like to ~~kill~~ overcome B. now if the master or servant, or parent or child to B. are present, and in rescuing B. kills A. he is excused. not so if he had not been a civil relation.

A stranger may justify killing (ut supra) to prevent a forcible capital crime. but not in any other case. As if one in attempting to prevent another from committing rape or murder on a third person, and in the act kills him. it is excusable. for he does it to prevent a capital crime. and would be inexcusable to suffer it

Public Wrongs.

3 Bac. 676. 1 Hale 478. Haw 105. 115. 7 N.B. 246. Co Lit 283.

No one can excuse the killing another by pleading misadventure, or self defence, it must appear in the evidence under the general issue.

2 Inst 148. 315. 1 Blac. 188. 1 Hale 425 1 Haw 114 Hob 282 —

Excusable homicide (whether by misadventure, or se defendendo) is said by Coke to have been anciently punished with death but by later writers it is denied

1 Black 188. 1 Hawk 115. 4 Blac. 95. 97. 8 2 Hawk 447.

The punishment seems to have consisted anciently of a total or partial forfeiture of goods & chattels. if total the offence would be felony, as Blackstone observes — (it seems to be strictly a felony but is not ranked with felonious homicide because not capital. felony being now used as synonymous with a capital crime —)

But as far back as the English records reach, the party has ever been, as he still is, entitled of course, and of right to pardon, and restitution of goods & chattels.

Inst 288. 2 Hawk 538. 539. 196. 115.

So that the punishment is at worst but nominal: indeed the judges in England usually direct or permit a general verdict of acquittal 4 Blac 188.

1 Hale 615. 616. 2 Haw. 447.

In excusable homicide there can be no accessories, and the reason is, there can be no felony —

III. Felonious homicide. — Is the killing of a human creature without justification or excuse; and may be committed, either by killing oneself or another person. —

4 Blac. 188. 1 Haw 102.

1st Homicide by killing ones self, is called self murder; and the party, a felo de se. Blac 189.

A felo de se, is one who deliberately puts an end to his existence, or commits any unlawful, malicious act, the consequence of which is, his own death: As if one in attempting to kill another the gun bursts and kills himself —

1 Hale 412. 1 Haw. 102. 4 Blac. 189. 3 Inst. 54.

Public Wrongs.—

But if one requests another to kill him and it is done the former is not felo de se; but the latter is a murderer. An assent or request merely, against Law, is void. —

1 Haw. 103. 1 Hod. 754.

A person to be felo de se, must be of years & discretion, and compos mentis — as in other felonies. Infants lunatics and those insane mind are not punishable —

4 Blac. 189. 190. 1 Haw. 12. 411. 1 Hawk 102. 3 Inst 54.

I admit of accessories before, not after, the fact; As if one persuades another to this crime he is a murderer. —

Black. 189.

The consequence of this self murder is an ignominious burial, in the high way, impaled and the forfeiture of all his goods and chattels. not of his lands, for there is no attainder — In Con. no such consequence follows — 4 Blac. 190. 387.

Doug. 324. 1 Hawk 103. Finch's Law. 216. 1 Hale 413. Wood 243. 259. 223. & 262. Ray. 7.

2nd The second kind of felonious homicide consists in the killing of another person, without justification or excuse — and is either with or without malice — 1 Haw 115. Blac 190

Foster. 5.

Hence, there are two kinds, manslaughter & murder. The former without, the latter with malice. Malice is here any unlawful or wicked motive. 4 Blac. 198. 199. It is an evil design. see Fost. C.L. 256. [no 60. p. 2] — —

4 Blac. 190. 1 Hawk 115. 1 Hale 466.

First, of Manslaughter.

It is an unlawful killing of another without malice expressed, or implied; and is either voluntary or involuntary. see Hale P.C. 466. 4 Blac 191. —

In manslaughter there are no accessories before but there may be after the fact 4 Blac. 191. 1 Haw. 115. [no 57. p. 1.]

1st Of Voluntary manslaughter. If two persons, on a sudden quarrel fight: and one kills the other, it is manslaughter. So if two go out aside, to fight. this being one continued act of passion.

4 Black 191.

Public Wrongs.

The last case is different from the case of duelling by an agreement; for here, there is a deliberate intent to kill; a previous malice. Therefore it is murder. And so in cases of preconcerted agreements to fight generally —

1 Hawk 112. 122.

If one is greatly provoked by another's misconduct, as by bulling his nose, or any other great indegnity. and in consequence of it, immediately kills him, it is only manslaughter, generally. But it is otherwise if there has been sufficient time, intervening, for passion to subside; for then it would be murder; and so in every case of homicide upon a provocation. 4 Blac 191.

4 Blac. 191.
Helg. 135.
Fost. 296.

So, if on a sudden provocation, one executes his revenge immediately, but in such a manner, as does manifest a deliberate intent to kill; or to do some other great bodily harm, and death ensues, even accidentally, it is murder. As by tying a boy to a horses tail &c. Or a Parent in correcting his child in an outragous manner. & the boy or child dies in consequence. it is murder.

1 Haw. 126.
Cro Ch. 131.
Palm. 545.
Helg. 127.
1 Hale 451. 473.
Fost. 292.
4 Black 199.

If a husband detects a man, in the act of adultery with his wife; and kills him instantly; it is manslaughter and in the lowest degree 4 Blac. 191.

1 Hale 486.
Kay. 212.

Bare words, or gestures; breaking a promise; a trespass on land, is never a sufficient provocation, to reduce even a sudden killing to manslaughter; where the killing is voluntary; or the manner of beating manifestly tends to endanger life. Fost 318. But it is otherwise, if it appear clearly from the manner, that he intended only to chastise, so that the killing was unintentional or without deliberate malice. 1 Haw 124. 1 Hale 456. Fost. 291. 295.

Hawk 124. 130.
Kel. 130. 131. 135.
3 Blac 666.
4 Blac. 200.
1 Hale 445. 473
Cro El. 779.
Noy 74.
Black. 200.

Public Wrongs.

Manslaughter on a sudden provocation, differs from homicide se defendendo, in this; that in the latter case there is apparent necessity for ye preservation; in the former there is no necessity, being the act of a sudden revenge

4 Black 192. and 184. —

2nd Of Involuntary homicide —

This, (as the term imports) is always unintentional; but ensuing upon some unlawful act; differs from homicide by misadventure, for that ensues upon some lawful act. 4 Blac. 192. Coup. 330. —

1 Hawk 111. 112.

If one accidentally kills another while engaged in any rash, idle & dangerous sport, as by sword play it is manslaughter. these acts are unlawful 4 Bla 183. 192.

3 Inst 56. 1 Hale 472. Foster 261. 292. 1 Hawk 112. Hob. 134.

So if an act, in itself lawful, be done in an unlawful manner; for here, under its circumstances, the act is unlawful: As by throwing a peice of timber or stone into the street, in a city, tho' the party gives warning. Or shooting where people usually resort. and in ei the case kills, it is manslaughter — —

4 Black 192. Kelg. 40. 1 Hawk 112. Hyan. 481. Hale 472. 473. 5. Foster 263. 292.

If the unlawful act be a trespass only; the killing is manslaughter only. If felony it is murder. 4 Blac. 193 —

Foster 258. 292. 1 Haw. 126. & 8 Ha 117. —

The Punishment. —

This being a clergyable felony, ergo it is not capital in Eng. in the first instance. But the offender forfeits all his goods and chattels, and is burnt in the hand. but (ut supra) not his lands, the crime not being capital. —

4 Blac. 193. 201. & 387.

In Con't it is different (Vide Stat. 285) when however it is involuntary it is not within the Stat. But voluntary may be punished still at Com. Law in Con't. — Invol'y at Com law. is in E. only a misdemeanor. —

Public Wrongs.

Of Murder.

4 Blac. 194. 5. 1 Haw 117. Kel 121. 1 Hale 447. Fost. 281.

This term was anciently applied in Eng. to the secret killing of another; for which the Vill, or if too poor the hundred was amerced. 3 Bac. 661.

3 Inst. 47. 4 Blac. 195.

Murder is now described to be. "When a person of "sound memory & discretion, unlawfully kills any reasonable "creature, in being and under the peace, with malice "aforethought, either expressed or implied"

The difference between this and voluntary manslaughter; is the one proceeds from sudden passion; the other from wicked & malicious intent — 4 Blac. 190.

1 Blac. 20. 25.

He must be, "of sound memory". so must every ~~killing~~ offender be. to be punishable —

1 Hale 425-6. 3 Bac. 664. 4 Blac. 196.

"Unlawfully kills". the unlawfulness arises from killing without warrant, or cause — the killing must be actual. for an assault with an intent to kill. is by itself, a misdemeanor only. tho' formerly it was accounted murder —

3 Bacon 662. Palm 548. 1 Haw 118. 4 Blac. 196. Swan. 384

Not only directly and forcibly taking away life, as by a blow or stab is killing within the definition; but 1st. any act of which the probable consequence is death, and which eventually occasions death, and if willful and deliberate; is murder. as by poisoning starving &c. modes of killing are infinitely various. / — As was the case, likewise of the son, who carried out his sick father, against his will, in a cold frosty season. Also of the woman who left her child in the field, covered with leaves only. It was killed by a kite.

1 Hale 431. 2. 1 Haw. 118. Palm. 545. 4 Bla. 197.

Public Wrongs

4 Blac. 197. 1 Haw. 119. 3 Bac. 603. Fitz. 856. 2 Ro Ra 598. 1 Hale 446.

4 Blac. 197. 2 Palm. 431. 1 Hale 430. and 617. 1 Haw. 118. 3 Bac. 663.

1 Haw. 3. 118. 3 Inst 91. 1 Hale 431. 436. 437. 440. 3 Bac. 603 Haw. 19 a

4 Blac. 196. 7. Fost 131. 32 f. 1 Haw 119. 3 Inst 48.

4 Blac. 197. 4 Inst 251. 1 Hale 470. 3 Bac. 664 Haw. 131.

4 so was the case of the parish officers who shifted the child about, till it died. and also the goaler, knowing a prisoner to have an infectious disease and confining him with another, who takes it dies; or if he confine him in a low unwholesome room; denying even the necessary conveniences — these are all murders —

And so if a person having a beast used to do mischief suffers it to go abroad, or even turns it loose in order to frighten people. and it kills some person. the owner is guilty of killing. in the first, it is manslaughter: in the second, murder — 2nd. so in some cases, where the actual killing is by another. As if one incites a madman to kill another. — or lays poison for one man and it is taken by another. or by dures of imprisonment, compels another to accuse an innocent person, who is condemned on his evidence — Kelg. 53. a.

Whether bearing false witness, with intent, to take away ones life, is such a killing as to amount to murder. provided the innocent is condemned. is a question. It was by the ancient common law. tho' there was no instance of it, for many ages. —

(In Con'. bearing false witness willfully and of purpose to take away any mans life. is punishable with death. (see Stat. 182) —

If a Physician gives a potion to cure. but which kills, it is homicide by misadventure. but it has been holden, that if the person be not a regular Physician, it is at least manslaughter. Sed quere. for quacks would not be so numerous, if it was —

Public Wrongs.

1 Blac. 197
1 Haw. 119.
3 Bac. 664.

But no person can be adjuged to have killed another in law, unless the death happens within a year and a day from the time, the act was committed. computing which, the whole day on which it happened is reckoned the first. —

1 Hale 428.
Keb. 17.
3 Inst 53.
1 Haw. 119.
1 Hale 428
3 Bac. 665.
Keb 26.

But if he dies within the time, it is no excuse for the other, that he <u>might have recovered</u>, had he not have been neglected &c. but if the wound or hurt be not mortal, and the party is killed by the remedies used & not by the wound. it is not homicide. but this must appear clearly —

4 Blac. 196.
3 Inst 319.
2 Hale 185.

A person indicted for one species of killing. is not to be convicted for a totally different species. As if he is accused of poisoning, shooting, starving. but where they differ only in circumstances. As if a wound is given with an axe, club &c, but alledged to have been given with a sword, it is otherwise —

1 Hale. 437. 8

But if several are indicted. A. as giving the blow. and B. present aiding and assisting. evidence that. B. gave the blow. and A was present, aiding &c. will maintain ~~the action~~ the indictment —

1 Blac. 497.5
3 Inst 50.
1 Hale 433.
3 Bac 665.
1 Haw. 121.

"A reasonable creature in being, and under the <u>peace</u>". Aliens and prow/outlaws are within this part of the rule — Killing any person whatever, except an alien <u>enemy</u>, in time of war. is murder —

Killing a child in <u>ventre sa mere</u>, is a great misprision only. it is not <u>in rerum natura</u>, for this purpose.

Keb 71.
4 Blac 119.
198. 1 Haw. 121
3 Bac 665.
1 Hale 374

Misprision is a high offence, under the degree of capital. but bordering upon it. it generally consists in the concealment of crime. something hidden — Haw. 86 —

Public Wrongs.

4 Blac. 198. 1 Haw. 121. 3 Inst. 50. 1 Hale 433.

But if the child be born alive and afterwards dies of the wounds he received in ventre sa mere, it is by the better opinion, murder. but the death must be within a year and a day, from the time. —

1 Hawk. 118. 1 Hale 431. 436. 442. 467.

(The epithet "reasonable", in this definition means I suppose "human". — not having the faculty of reason. madmen, Idiots &c. one who incites a madman to kill himself, is guilty of murder. This term reasonable is used in opposition to a brute —)

1 Haw. 121. Cy 186. 3 Inst 51. Kel. 127.

If one compels another to kill a child in ventre sa mere, and being born it is killed in pursuance of the act. he is accessory to murder — 1 Hale 429. 433 —

By Stat. 21. Jac. 1. and Stat. 6 Geo. if the mother of a bastard child conceals its death by burying it privately or in any other way, she is deemed guilty of murder unless she can prove, by one witness at least, that it was born dead. The construction practically given to these statutes, here, and in Eng. makes it necessary to the mothers conviction, that there be presumptive evidence at least, that the child was born alive —

1 Haw 121. 3 Jac. 665.

4 Blac. 198. 2 Sev. 303. 4.

"With malice afore thought, expressed or implied" — does not mean, strictly spite or malevolence to the object but any evil design in general; the dictate of a wicked, depraved, malignant mind. (the court, not the jury are judges of the malice; that is, of what amounts to malice. so that the facts being given the point is a question of law.) — . Malice prepense expressed or implied — It is said to be expressed, when one with a deliberate & formed design, to kill or otherwise to

4 Blac. 199. Post 256. 2 Roll. 461.

2 Ray 1493. Bur. 396. 474 937. 3 Ser. R 428. —

4 Blac. 199. 1 Hale 451. 1 Haw. 121. 3 Bac. 666. Kel 129.

personally injure some particular individual, does actually kill him in the execution of this design: As lying in wait, former menaces, old grudges & are all evidence of the formed design —

1 Haw. 122.

(Express malice, (seems to me to be) that which in point of fact concurs with the act of killing —

Implied malice, that which so concurs only by the implication of law.)

4 Blac. 199. 200.

Where one kills another in consequence of an act, which indicates enmity to all mankind. As, by shooting into a crowd. it malice sufficient for murder —

1 Haw 122. 1 Bulstr 86. 7. Kel. 129. 3 Bac. 665. 2 Bulstr 147. 1 Coll 300. 3 Bulstr. 171. 1 Hale. 452.3

So in the case of deliberate duelling, it is malice prepense. expressed. — And it is no excuse that the other attacked first, or that he accepted the challenge reluctantly; or that he did not intend to kill him, but to disarm him 4 Blac. 199. — So the seconds of the

Blac. 199. 1 Haw 124. Arcem. 514. 1 Hale 447. 451

persons killing, are guilty of murder, by express malice and according to some, the seconds also of the person killed are guilty of murder — Ted. grace —

Hawk 124. Bac 255.

If a person upon no provocation (or at least a slight one) does suddenly attack one and kills him, it is murder, by malice express; for so cruel and ferocious an act, in such a case, is evidence of hardened, deliberate malignity towards the person slain — (Blackstone calls it implied malice (pa 200) (Vol 4.) but it seems to me express.)

1 Haw. 126. Cro 6. 191. Salm 544.

Generally, if even on a sudden & great provocation, one beats another, in an unusual, cruel manner, and kills him, it is murder by express malice. As was the case (ut supra) of the boy tied to horse — 4 Blac 199. 1 Hale 454. 447.

So if on a sudden quarrel, he who kills appears to have been master of his passion at the time, it is murder by express malice. — 1 Haw. 127. Kel. 56. — And if one, committing a breach of the peace (as by fighting &c.) suddenly kills an officer of the peace, who attempted to suppress it, "is guilty of murder. — But the object of the interference must be made known, except in the case of an officer, known to be such, and acting within his district, otherwise it is only manslaughter. Kel 66.

1 Haw. 127.
Kelg. 66.
3 Inst. 52.
4 Coke. 40.
9 Ab. 68.
East 308
135. & 311.

2ly Malice is implied, when the killing is in consequence of an unlawful act, altogether, or principally intended, for some other purpose, than that of killing the person slain — As if one shoots at a fowl, with intent to steal, and accidentally kills some person: or if he shoots at A, & kills B.; or lays poison for A and it is taken by B. — But the intended act, must be felony; otherwise the killing is regularly manslaughter (Express malice, seems to be that which in point of fact concurs with the act of killing (ut supra). Implied, that which is concurs only by imputation of law.). If one gives poison to a woman, in order to procure abortion and it kills the woman, it is malice implied — (Quere. Is the act intended, a felony?). but lying wait & killing &c it is otherwise. (express). — A husband gave his wife a poisoned apple to kill her; she gave it to her child and it died. this is implied — 1 Haw 126. Haw 474.

4 Haw. 122. 126.
4 Blac. 200.
Kelg. 117.
17 Hale 465. 474.
Ind. 87.
Plowd. 101.
3 Bac. 667.
7 Haw 112. 126
Kelg. 117.
4 Blac. 183. 192.

4 Blac. 201.
1 Hale 429.

3 Inst. 51.
9 Coke. 81.
1 Hale 436.
Ind. 467.

But when one kills in consequence of such an act, indicates enmity to all mankind, though not to the dead in particular, it is express — 1 Ray. 143. —

Haw. 113.
3 Inst. 57.
East. 262.

Public Wrongs.

1 Haw. 126. 1 Hale 463. Hast 29. 135. 308.

If one kills an officer, in a struggle to escape from arrest, it is murder, by malice implied. The design here, was principally to escape, & not to injure the officer.

1 Haw 129. 130 9 Coke. 66. 68. Hast. 237. 311. 318 Cro. J. 280. 486.

In this case, it is no excuse that the process was erroneous; for it was not void by being so: the same rule holds though the officer did not inform, for what cause he was about to arrest — And so, tho' the Officer (if he was a public one) did not shew his warrant beforehand —

4 Blac. 201. Hast. 255. 1 Haw. 124.

All homicide is presumed to be malicious, & the onus probandi lies on the accused.

Therefore all homicide is murder of course unless, it be justified by command or permission of law. It is excused on the ground of self defence, or mis adventure, or alleviated into manslaughter, by being, either the involuntary consequence of some unlawful act, not amounting to felony; or occasioned by some sudden & great provocation.

4 Blac. 21.

The Punishment of Murder, is death; originally, it was clergyable; so that unlearned offenders only, were capitally punished — 4 Blac. 201.

1 Hale. 450.

Now, by the Eng.d stat.s (23 H. 8. 1 Ed. 6. 4 & 5 Ph. & Ma.) the benefit of clergy is taken away from murderers, their abettors, procurers & counsellors — the stat.s seem not to extend to accessories after the fact. — 4 Blac. 201.

2 Haw. 488. 631. 3 Inst 53. 2 Hale. 399.

If a woman is condemned during gestation (when quick with child) execution is respited till her delivery. But this is no excuse for not pleading, or for the judgment's being delayed — A respite for this cause can be had but once — but becoming insane before execution will delay the same — 4 Blac. 395. —

1 Haw. 658. 2 Hale. 383. 4 Blac. 394. Finch L. 478. 3 Inst 17.

Public Wrongs.

3 Haw. 638. Nich L. 469.

Execution is not compleat, till the convict is dead. — On revival, he must again be executed. for a former hanging being no excuse. 4 Blac. 406. 2 Hale 412. —

Petit Treason.

4 Blac. 203. 4 Inst. 107. 324. & 336. —

There are certain instances in which murder, as being more than ordinarily heinous, is denominated, Petit Treason. It is now, indeed no other than murder, in its most odious form & degree. —

1 Haw. 131. 3 Inst. 20. 1. 1 Hale. 377. 382. 5 Bac. 140.

At Common Law, many offences were called petit treason which are not now so considered. As Piracy by a subject. Grand jurors discovering the kings counsel. A wife is attempting to kill her husband &c.

4 Blac. 203. 1 Haw. 131.

Now, by Stat. 25 Ed. 3. no offence can be petit treason, except in the following instances. 1. When a servant kills his master. 2 when a wife kills her husband. 3. (In Eng. when an Ecclesiastic kills his prelate. (this last has no force in this country.) 5 Bac. 141.

Inst 107. 324 336.

It is called treason, by reason of a violation of private allegiance, in addition to murder. 4 Blac 203.

1 Hale 378. 380. Dy. 254. 1 Haw. 131. 5 Bac. 141. 4 Blac 203.

Killing a husband &c is not petit treason unless under such circumstances as would make the same killing of another person, murder. 5 Bac. 141. 4 Bla 203.

4 Blac 203. 1 Hale 380. 1 Haw. 132. —

If a wife, divorced "a mensa et thoro" kills her husband she is a traitress; otherwise if divorced "a vinculo" &c —

If a wife procures a stranger to murder her husband, (being herself absent at the time) she is accessory to murder only; but if a stranger procure the wife to do it, he is accessory to petit treason. for his killing is murder hers is petit treason. — 5 Bac. 142. 3 Inst 20. 139. —

1 Hale 24. 5. 1 Haw 132. Dy. 228. 332.

Public Wrongs.

5 Bac. 142. 2 Inst. 20. Plow. 86. 1 Haw. 132. — The murder of ones mistress, or master's wife is petit treason though not within the letter of Stat. Ed. 25. 3. — And the murder of one who has been master, upon malice conceived having service, is petit treason; because in execution of a treasonable intention - 1 Haw 132. Plow 260. Ho. 99. —

3 Bac. 142. 4 Blac. 203. 1 Haw 131. 3 Inst. 20. 1 Haw. 380. — The murder of a father, by a child is not petit treason, unless the latter is, by a "reasonable construction" a servant. —

The punishment, in case of a male in petit treason, is "to be drawn to the place of execution and hanged. Of females, to be drawn, &c and burnt. 4 Blac 204. 2 Hale. 399. —

3 Inst 211. Plow. 634. 1 Hy. 173.

Of Arson.

3 Inst. 66. 2 Ro. 18. — Arson is the willful & malicious burning of the house or outhouse of another. 4 Blac. 220. 1 Hale 556. —

1 Hale 567. 4 Co. 20. 1 Haw. 165. — Not only the dwelling house but all outhouses, that are barred or ditched within the curtilage or horstall. (as barns, stables, &c. may be the subject of Arson. 4 Blac. 221. A barn, filled with corn, is without the definition, though not barred &c — burning a stack of corn was anciently arson, but it is not so now. —

4 Blac. 221. Haw 166. 3 Inst 67. — Burning the frame merely, of a house is not arson; because not within the meaning of "domus." 1 Haw 166.

1 Hale 568. 3 Inst. 67. 1 Burn. 287. — Arson may be committed by burning one's own house, it is said, if, in consequence of it, another's house is burnt. But here the offence consists in burning the latter.

4 Blac. 221. Cro C. 377. 1 Haw. 166. — For if one, seized in fee, or possessed for years only, of a house, standing at a distance from all others, burns it, it is no arson. 1 Haw. 166. Cro C. 377. —

3 Inst 351. Inst. 116.

Public Wrongs.

Kel. 29. Foster 114. 116. Cro C. 338

A Tenant, so seized or possessed, in a town or City, burns his own house, even with ~~[illegible]~~ intent to burn another's, but actually burns his own only; it is not arson, by the stronger opinion — 1 Haw. 166. 1 Hale 568. 4 Bla. 221.

4 Blac. 221. 1 Hale 568 1 Haw 166. 7.

But the wilful firing of ones own house in a town, is a high misdemeanor, and is punished with fine, imprisonment, pillory. & sureties for good behavior for life.

2 East 115. 1 Haw. 166.

If a Landlord or reversioner burns his own house, while in the tenants possession, it is arson. for it is considered as the tenants house pro tem. — 4 Blac. 221.

What is Burning? — Neither a bare intent, nor an actual attempt, by applying fire merely, is a burning, tho' part be burnt. But the actual burning of any part is, though it be extinguished, or go out, it is — ~~[illegible]~~

1 Haw 167. 1 Hale. 570. 3 Inst 66. 4 Blac. 222.

~~[illegible]~~

1 Haw. 175.

The burning must be malicious, otherwise it is only a trespass; burning thro' negligence, or accident, is not arson. As if one in shooting, accidentally fires a barn or house 1 Haw. 167. 1 Hale 569. 4 Bla. 222. — Yet if one, intending maliciously to burn the house of A, and accidentally burns the house of B. it is arson; on account of the felonious intent —

1 Haw. 167.

Arson is a Common-law felony, punished with death. In the reign of Edw. 1. it was burning to death, and is not clergiable. But it seems to have been entitled to clergy by Stat. 25. Edw. 3. but was ousted of it by 21 Hen. 8. which being repealed by St. 1 Edw. 6. it was again ousted by Stat. 4 & 5. P. & M. ea cons. it is entitled to clergy — 4 Blac. 374.

2 Haw. 181. and 303. 4 Blac. 222 and 223. —

4 Blac. 222 The benefit of the clergy is also denied to accessory in arson, by Stat. 4 & 5 Ph. & Ma. — (By Mass. this offence, if committed by a person of the age of 16. or more, is punished with death, if prejudice or hazard happen to the life of any one — If a person, here, under sixteen, commits the act, it is punishable for a high misdemenor. — (By another Stat. of Con.t. if any male of the age of sixteen or more shall wilfully & feloniously attempt to burn by setting on fire, any dwelling-house, shop, store, ship or vessel, and no prejudice or hazard accrues, he is sentenced to Newgate, at the discretion of the court, not exceeding seven years, and to satisfy the private damage. (For a vessel &c. of the U.S. or this State, if burnt by a master &c. the Stat. adds a forfeiture, of all the goods and estate. — Stat 1785. 6).

1 Haw 168. 1 Hal. 324. 571. & 685. Dy. 323. 2 Bulst. 249. For a second offence, it is confinement in Newgate for life or any limited period; but according to the general rule, the second offence must be committed after the conviction for the first. — (In case of a female, it is confinement in the common work-house; or commitment to goal, in the county in which she offends for the same period as males in Newgate. Stat. Con. 186.) Do the words "attempt to burn by setting on fire" mean such burning as falls within the common law definition? If so, it may be argued, that the burning punished by the 1st Stat. must be total. sed quere. burning has a determinate meaning in law. — Does then a partial burning of a ship &c come within the 1 Stat.? it does. the same act is contemplated in case of a vessel, as in the case of a house barn &c. —)

Public Wrongs

Of Burglary.

3 Inst 63. 1 Haw 549. 2 Ib. 366.

Burglary is the act of breaking, and entering into the mansion house of another, in the night season, with intent to commit a felony - 4 Blac. 224. 1 Bac. 335. 1 Haw. 159.

4 Blac. 224. 1 Hawk. 162. 1 Bac. 335.

— But as to the "place" it is not necessary, absolutely, that the breaking should be, of a mansion house; for it may be a church, the walls of a town — The necessity of its being a mansion house obtains in the case of a private building only; and the definition ought to include the walls of a town & churches. —

4 Blac. 225. 1 Hawk. 162.

The insertion of the word "mansion" seems indispensable in the indictment; when the breaking is of a private house. otherwise not. - 1 Hawk. 162. 1 Bac. 335. —

The term "mansion house" includes all outbuildings, which are parcel of the house and within the curtilage, or homestall; being protected and privileged by the capital house. 4 Blac. 225. 1 Hale 558. 1 Haw 163.

3 Inst 64. Kelg. 27. 52. 82. 1 Bac. 335. Dalton. 42. 52.

The curtilage, seems to be that portion of the ground which is enclosed with the house, by one common fence or is connected with it directly by a fence; therefore, an out house 8 feet distant, seperated by an open passage, and not within or connected by any fence, that encloses both, is adjudged not within the curtilage —

1 Haw. 163.

Rooms or lodgings in a private house (if the owner does not lodge in it, or if he enters by a different outward door) are the mansion houses of the lodgers. and are included as such in the above definition —

4 Blac. 225. Kelg. 83. 84. 1 Hale 556. 1 Haw. 163.

Public Wrongs.

Cowp. 1. Tal. 532. 1 Haw. 162.

But it is otherwise, if the owner lodges in it and enters by the same outward door. for here is only one mansion-house; that of the owner's. —

1 Hale 558. 1 Haw. 164. Hut. 93. 1 Bac. 335.

If A. has a shop &c. within his curtilege and lets it to B. to work in, who never lodges in it, burglary cannot be committed in it — It is not A's. mansion house, being severed by the lease; nor B's. for he never lodges in it. but otherwise if. he had lodged in it — 4 Bl. 225.

4 Coke. 40. 4 Blac. 225. 1 Hale. 556. Fost. 77. 1 Haw. 162. Mod 660. Kel. 43. 46.

A house, in which one sometimes resides, tho' left for a short season, "animo revertendi" is a mansion house tho' no one be in it at the time of the breaking &c. So a house, which one has hired to reside in, and brought part of his goods there, tho' he has not yet lodged in it. if it is broken &c amounts to burglary. Kel. 43. 5 Fost. 77.

Ray 270.

The house, also, of a corporation, is within the definition: the officers living in it, makes it a mansion house of the corporation. But burglary cannot be committed on a tent, or booth, for they are merely temporary —

1 Bac. 335. 4 Blac. 226. 1 Hawk. 164.

(Under the Stat. Con. burglary may be, not only as at com. law, — but breaking &c. a shop, in which are goods wares, & merchandise; though at a distance from the main house & not lodged in: and it was decided that the cabin of a vessel containing goods, was an object of burglary.)

"Night season". Formerly it might be committed at any time, between sunset & sunrise; but now the term "night season", includes only the time between the evening and morning, twilight — dusk or dark. when one cannot distinguish the features of another clearly. — but it ~~must not~~ may be moonlight. —

1 Bac. 224. 1 Blac. 224. 1 Hale. 350. 3 Inst. 63.

Public Wrongs.

As to the manner. both breaking and entry is necessary - but they need not be at the same time. for breaking on one night, and entering on another is sufficient -

4 Blac. 226.
1 Hale. 551.

The breaking may be, not only by thrusting open a door; but by breaking or taking out a pane of glass from a window, picking a lock, opening it with a key; lifting a latch; or unloosening any fastening whatever in order to get in. And coming down a chimney; for it is as much closed as the thing will admit — 4 Blac. 226.

1 Haw. 160.
1 Hale 508. 527. 551. 552. 555.
Kely. 57.
Hutt. 96.
East. 107.

Entering by an open door, or window is not breaking within this definition - but if having entered he does break an inner door. it is burglary. —

4 Blac. 226.
1 Haw 160

According to some writers, if one assaults a house with intention to rob, and on the owners opening it, to drive him away, he enters, it is a breaking within this meaning - the opening, being occasioned by the felonious attempt, is imputed to him -

4 Blac. 226.
1 Haw. 161.
Archbh. cr.
1. Bac. 333.

Whether breaking out, the party having entered with intent to rob, without having broken in, or being in by the owners consent, is a breaking within this definition, is doubted at Com law. Opinions are contrary. By Stat 12 Ann. it is declared to be so. - here the entry is before the breaking; as by taking lodgings with intent to steal. But being in a house without a previous intent to rob, he commits a felony and then breaks out. is within the Stat. But in both of these cases if he goes out peacably and quietly without breaking, it is not properly burglary within the definition, nor within the Stat. -

1 Haw. 161.
1 Bac. 333.
4 Blac. 227.
1 Hale. 554.

1 Haw. 160.

Entry procured by fraud, (with intent to steal &c. ut supra) is burglarious — As if one is let in under pretence of business and then steals. or if one procure an officer to enter, under pretence of searching for traitors &c. and then steals. This is a breaking; an opening, which is occasioned by a felonious attempt. for the Law is not thus to be evaded by cunning. —

4 Blac. 226.
1 Haw. 161.
2 Hel. 42. 52.
53. 82.
1 Hale. 552.
3 Inst. 64.
1 Bac. 333.

If a servant opens, and enters his masters chamber door, (with intent to rob) or if a lodger in a private house, or inn, opens and enters another's door, with this intention, it is a burglarious breaking and entry — for it is the mansion house of the proprietor. And if a servant conspire with a robber, and let him in by night, that he may rob, both are guilty of burglary. —

4 Blac. 227.
Foster 381.
1 Hale 553.
1 Haw. 162.
Q. B. 1784.

Of Entry. The least entry, with the whole or a part of the body — or the thrusting in an instrument or weapon (as a pistol, hook &c.) or discharging a gun into it. is a burglarious entry. 1 Haw. 161.

Foster 108.
2 Kelg. 57.
1 Bac. 334.

But it seems that the instrument must be introduced for the purpose of committing the felony; As with a hook to draw out goods. or with a pistol gun &c to demand one's money. &c. It was decided C. Bailey in 1785. that boring a hole thro' the door, so that there were chips on the inside, was not a complete entry. As it was not introduced to take the property, or to kill, or to intimidate, for the purpose of robbing. —

Haw. 162.
1 Bac. 334.

As to the case put, of turning the key of a door, that is locked on the inside, whence query, whether it is burglarious. Vide. 1 Haw. 162. Foster 330. 353. —

Kelg. 111.

Public Wrongs.—

4 Blac. 227.
1 Haw. 164.
Ly. 99. Kel 30. 67.
1 Hale 562.

To constitute Burglary, there must be a felonious intent, otherwise the breaking is a mere trespass. As was a decided case. A servant having runaway, returned, broke open his masters house, to take his money. it had been otherwise, had it been to murder rob &c.

1 Bac. 336.

It is sufficient, if the intended act is a statute-felony though it be not at common law — As if it be to commit a rape, which is not felony at Com. law. — for a stat. felony has all the properties of a felony at Com Law.

1 Haw 164.
4 Blac. 228.
Hra. 481.
1 Bac. 336.

It is not necessary that the intention should be executed. the intent alone is sufficient — And of the intent, the jury are to judge — 4 Blac. 227. 1 Haw 159.

Hobbs.
2 Hal. 549
2 Ib. 360.
1 Bac. 336.

Of the Punishment. Burglary is a felony at Com. law, but clergyable — It is now punished with death. and the benefit of the clergy is taken away by Statute 1 Ed. 6. and 12 & 18 Eliz — It is also taken away from the accessories before the fact. by Stat 3 & 4. W. & M. but these statutes extend not to accessories after the fact. —

4 Blac. 228
1 Haw. 165.
2 Hale. 364.
1 Bac. 336.

In Con. for the first offence, newgate or jail not exceeding three years — for the second, not exceeding six years for the third during life. But if he be also guilty in the perpetration of any personal abuse, force or violence; or so armed with any dangerous weapon, as clearly to indicate any "violent intentions," it is then, newgate for life, even for the first offence. — It was decide in Con. that burglary being an offence at common law, may be prosecuted as such, and that the statute only declare the proper positive punishment. — 1 Root 39. —

Public Wrongs.

Of Larceny.

4 Blac. 229. 1 Haw. 134. There are two kinds of larceny or theft. 1st Simple. 2d Mixed — Simple, is plain theft, unaccompanied with any aggravation — Mixed or compound includes in it, the aggravation of taking from ones house or person.

I Of Simple Larceny —

1 Hale 503. 4. Host. 121. 4 Blac. 229. 2 Bac. 474. 1 Haw. 134. 145. Simple Larceny is the "felonious taking and carrying away of the personal goods of another." — If the goods are above the value of twelve pence, then it is grand larceny. If of the value, or under, it is called petit larceny — If the goods, being above the value are stolen by several, each is guilty of grand larceny — 1 Hale. 531. 1 Haw. 145. Stealing under this value, at several times, from the same person, is not grand larceny —

B B. 178. Ket. 719.

4 Blac. 229 1 Haw. 146. Host. 73. The only difference between grand & petit larceny is in the value of the goods — hence the rules laid down with respect to the nature of simple larceny in general, apply to both grand & petit larceny — In the punishment they are essentially different. —

4 Blac. 232. Of the Taking. It must be from the possessing the owner, actual or constructive — The general rule is, that every felony includes a trespass — hence if the party is guilty of no trespass in taking, he cannot according to the rule be guilty of felony in carrying away — Hence if one finds goods and converts them, "animo furandi" it is not larceny for here, clearly is no trespass committed in finding them —

1 Haw 134. 2 Bac. 472. Kel. 24. 2 Blac. 230.

Public Wrongs.

And, generally, one possessed, under a delivery by the owner, it is said, is not guilty of larceny, by afterwards embezzeling them — As if a carrier of goods, who converts them &c. or a taylor of cloth &c.; but in these cases of delivery, the felonious intent is supposed to be subsequent to the delivery; therefore the possession is by the delivery, parted with —)

4 Blac. 230. 2 Bac. 472. 1 Inst 103. 4 Haw 134. 1 Hale 504.

If one obtains a delivery, with intent to steal; and carries it away, or embezzles it; it is larceny. — Thus, the obtaining a bill of exchange, under pretence of discounting it, but with intent to steal; and then converting it &c is larceny — 4 Haw. 135. 137. Hale 63. —

Kel. 81. 2. Show. 50. 57. 2 Bac. 473. 3 Inst. 108. 4 Sid. 254.

This is no exception to the general rule above, — for the felonious intent, extinguishes the consent or permission — Therefore the owner retains the possession in law, and the taking includes a trespass of course pursu'd for the taker, shews his original intent, to have been, not to take on the contract, but with intent to steal —

Kel. 82. Lev 275.

To obtaining goods from an officer, with intent, to steal, (under a replevin &c by virtue of an execution on a judgment obtained by fraud on the Court &c.) is a felonious taking: for the replevin & judgment are void.

2 Bac. 473. 1 Haw. 136. 3 Inst. 108 Kel. 43. Ray. 276.

Quere. as to the case of delivery to a taylor &c. (supra) For lately it is holden as a general rule; that when the delivery is for a certain, special purpose, (the owner having a right to countermand the delivery). The possession is in the owner. therefore embezzeling animo furandi is a felonious taking — As if a watch-maker embezzles animo furandi a watch delivered

O.B. 1779.

to him to clean — and so of cloaths delivered to be mended.
C.B. 1772. Guineas delivered to be changed and the like examples. — On these cases, a previous intent to steal, seems not to be supposed — But the possession being in the owner,
Haw. 135. 6. the taking & converting with a felonious intent is a felonious taking from the owner — Would the taking in this case be a trespass, ut supra? — (Possibly, the act of converting with a felonious intent, is considered as determining the bailment.)

3 Inst 107. 1 Hale. 505. 2 Bac. 479 1 Haw. 136. 1 Blac. 230. It seems clear that carrier, having carried the goods to the place, if he takes them "animo furandi", the taking is felonious, tho' no intent felonious was originally cogitated. for the bailment is determined then — therefore he is a stranger —

So if a carrier opens a bale of goods, and takes away part, or pierces a cask of wine &c. it is a felonious taking — (Because (as some say) he had no property in the goods. (sed quere.) tho' he had in the thing containing them. — And Blackstone says, it is, because the animus furandi, is manifest. — The true reason seems to be that the bailment is determined by the action of the animus furandi — or that the possession is all the time in the owner. —

2 Blac. 473. 4 Ib. 230. It is said that if A. lends B. a horse, and B. rides away with him, it is not larceny, and the true
Blac. 230. reason seems to be, that the constructive possession is not in the bailor — he having no right to redemand, or countermand, the loan of him, till the time of agreement is at an end —

Public Wrongs.

4 Blac. 230. "The bare non delivery, of goods by the bailee to the bailor, is not of course evidence of a felonious intent, even in those cases, in which converting, animo furandi, is larceny; for it may happen from various causes.

At common law, if a servant runs away with goods, committed to his custody and possession, it is not a felonious taking; but a mere civil wrong; a breach of trust — Now by Stat. 21. H. 8. it is larceny if the goods are of the value of 40 s. except in servants and apprentices and eighteen years of age —

2 Bac. 474
4 Blac. 230.
1 Haw. 98.

But at common law, if the servant had not the possession, but merely the care and oversight &c. then the running away with or embezzling them is accounted a felonious taking. As in the case of a shepherd running off with the sheep. or a butler with provisions &c.

4 Blac. 231
1 Hale 505. 6.
1 Haw. 186.
Mod. 246.
Poph. 84.

So if one steals goods in the county of A. and carries into the county of B. he is guilty of a felonious taking in the county of B. — and may there be prosecuted; for every moments continuance of the offence of taking, is a repetition of it. — he may also be prosecuted in the county of A. — —

1 Haw. 136.
Root 109

Of "carrying away." "The least removal from the place, is a carrying away, within the definition — though he afterwards leave them, or is detected. Thus, leading a horse out of the close, and is apprehended. — so carrying goods down stairs only. — And so taking of things out of a trunk and laying the same on the floor. with felonious intent. and is caught in the act. — 4 Blac. 231. 1 Haw. 140. —

3 Inst. 108.
2 Ven. 215.
1 Hale 508.
Hel. 31.
2 Bac. 474.

1 Haw 141. Raising a bale of goods on its end, is not a carrying away, here meant; not being removed from the spot.

O B. 1784. But removing from one end to the other of a waggon is sufficient. as was the case of the diamond earring—

"Feloniously" - The taking and carrying away must be feloniously, ie, animo furandi. - hence those who are wanting in understanding are excused; and so are mere trespassers - As if a servant privately takes his masters horse to ride and returns him - So the

4 Blac. 232 taking away ones plough without leave and using
1 Hale 509. it - but returning it again - The felonious intent must determined by the jury —

"The personal goods of another" - Things real, or savouring of the reality are not the subjects of larceny — Land cannot in its nature be taken and carried away. - &

1 Haw 141 corn, grass, apples &c. growing, are not within the
1 Vent 187. law, as they adhere to the freehold — that is, if they
4 Blac. 233. have severed and carried away by one continued act;
2 Bac. 470. for then they never were as movables in the poss-
1 Hud 89. ession of the owner, actual or constructive, but it is
1 Hale 509. made larceny, in many cases, by Stat. 4 Geo. 2.
Haw. 142.

If however, the thing, is severed at one time and

4 Blac 233. taken at another and carried away — whether severed
3 Inst 109. by the thief or by the owner, or any person.) here,
1 Hale 510. when they are taken, they are personal, in the
1 Haw. 141. owners possession — The reason for the distinc-
2 Bac. 470. tion between personal chattels and things ~~taken~~ fixed
1 Vent 187 ~~from~~ to the freehold, may be, that as the latter are not so easily taken and removed, they are not so liable-

1 Haw 142. liable to be stolen — therefore so severe laws are not
2 Bac. 469. necessary to them — difference of reason; generally
and 470. they are not considered so valuable.

Taking charters of land cannot be larceny, for
3 Inst 109. they relate to the reality. They are muniments of
1 Hale 66. 510. the freehold, & descend to the heir — yet an action of
Stra. 1137. trover will lie for them 4 Bac. 470. 4 Blac 234.

The goods must be of some value in themselves
and some one must have some property in them.
4 Blac. 234. hence the taking of chaps in the action cannot at
8 Coke 38. a common law be larceny. they being of no value,
1 Haw 142. intrinsically, but merely by a relation to some-
2 Bac. 470. thing else (viz. the right of which they are evidence) —
1 Hale 66. con and this right is not property in possession; because
they might answer the purpose of money at the cany.)

Taking animals ferae naturae, & not tamed nor
confined cannot be larceny at Common law. tho'
4 Blac. 235. of intrinsic value. As deer in a forest, fish in an
Foster 366. open river; & wild fowls in their natural state. for
1 Hale 511. here seems to be no property. —
2 Bac. 471.
1 Hawk 143.

But if they are confined, and claimed, and may
4 Blac. 236. serve for food — it is otherwise. As deer in a park, or
2 Ch. 393. fish in a trunk. for here is a property — But such
1 Hale 511. animals ferae naturae as will not serve for food are
generally deemed of no value, in the law on this
2 Blac. 393. subject. Therefore, tho' reclaimed or confined, taking
4 Ch. 235. them cannot be larceny at Com law. As foxes, monkeys
&c. yet even in these cases a civil action will lie
for taking them 1. Haw 143. 2 Bac. 471. 3 Inst 109. —

2 Bac. 471. 3 Inst 109. 4 Blac 236 — Yet the taking of a hawk tamed may be larceny — it is said by common law, as well as by Stat. 37 Ed. 3.

1 Hale 511. 1 Haw. 144. 4 Blac. 236. — But domestic animals may be valuable, though not serving for food, as horses mules &c. and are therefore subjects of larceny — so those which do serve for food, as neat cattle, sheep, swine, poultry &c —

4 Blac. 393. 2 Bac 471. 1 Haw. 143. — Some domestic animals are not deemed valuable in the law on this subject, as, Dogs, cats &c. therefore the taking of them, is not at common law, larceny —

1 Haw. 144. 1 Hale 512. 2 Blac. 295. — Goods of which no one is the owner, at the time of taking, are not subjects of larceny; As treasure trove; waifs, estrays &c before they are seized by the persons having the right — Here, at the time, the property is in dubio, or rather in no one. — It may become the kings, or in certain events, be vested in the former owner.

1 Haw. 144. Dy. 99. 4 Blac. 235. 1 Hale 512. — But though there must be a property in some person, at the time, yet it is said that the owner need not be known — And that the indictment lies for stealing the goods of a person unknown" — And here the king shall have the goods. —

2 Hale 290. 8 Mod 249. — But it is said, that at the trial unless the property is proved to be in a stranger, it shall be presumed to be in the prisoner — Qu. 1 Hawkins 145. recites 8 B. 148. — Stealing the goods of a parish church is larceny — for they are the goods of ~~the parishioners~~ parishioners — And

1 Haw. 245. 1 Inst 110. 12 Co. 113. — so stealing a shroud from the dead body — for it is still the property of them who was the owner, when it was first put on. Stealing or taking up a dead body is no larceny, but an indictable offence. a misdemeanor Inspior —

7 Ser. R. 733.

Public Wrongs.

1 Haw. 145. 3 Inst 110. Cro El. 536.

It is said, without a question, that in one case a person may commit larceny by taking his own goods. As, if one delivers goods to a carrier, or a taylor, and afterwards secretly and fraudulently takes them away with intent to make the bailor answerable —

Haw. 145. 0 B. 1785.

If the goods of A. are bailed to B. it seems that a person stealing them away may be indicted generally for stealing the goods of B. —

2 Bac. 475. 1 Haw. 146. 4 Blac. 95. 97.

The Punishment. — Simple larceny, whether it be grand or petit, is at common law, felony — 1 Hale 69.

4 Blac. 237. 1 Hale 12. 3 Inst 53. 2 Hawk. 469.

Grand larceny, is a capital felony at common law, but within the benefit of the clergy, which however, in many cases is taken away by the Statutes, as in the case of horse stealing —

3 Inst 218. 1 Hale 70. 530. 1 Haw. 146. 2 Bac. 476.

Petit Larceny, is forfeiture of goods and chattels, and whipping or other corporal punishment — but it is no forfeiture of lands, it not being a capital felony —

4 Blac. 237. 4 Blac. 95. 97.

Blackstone says that it is punished by imprisonment or whipping at common law; yet he calls it a felony; and says that it subjects a forfeiture — By that, it is transportation for seven years —

(In Con: there is no distinction between grand and petit larceny — It is a fine, not exceeding seven dollars; and if the value of the goods amount amounts to $3.34. whipping not exceeding ten stripes — If of the value of 84 cents or more and under $3.34. it is whipping &c. on failure of paying the fine. If under 84 cents there is no whipping. But treble damages to the owner in this case. —)

II Of Mixed Larceny. This has all the properties of simple Larceny. therefore the rules laid down, as to simple larceny will apply to this — But it is also accompanied with the aggravation of taking from ones house or person or both. —

4 Blac. 239. 1 Haw. 151.

1st Larceny from the house. This, though now more aggravated than simple larceny is not distinguished from it, at Common Law; either in its general nature or punishment: if, indeed, it is accompanied with a breaking of house in the night season, it differs most essentially: but then if so, it falls under a different description it is not larceny. but Burglary —

1 Haw. 151. 4 Blac. 239. and 240.

But by the Statutes in England, the penal consequence of larceny in a house, differs from those of simple larceny in general — Benefit of the clergy, being taken away from the former; and in almost all cases.

1 Haw. 151. 1 Hale 500. 4 Blac 240: Hel. 31. Fost. 78.

2nd Larceny from the person. This is either by stealing privately or by open and violent assault. — the latter offence is called robbery —

4. Blac. 243. 1 Haw 141.

The offence of privately stealing from the person, (as by pocket-picking) is, at common law, a felony — and if above the value of twelve pence it is capital — but clergyable at com. law: The Stat. however takes it away. The theft being of the value of 12 pence only or under, is not capital — The difference then, between simple larceny. and privately stealing from the person of another, is; that in the latter case the benefit of clergy is taken away, if above the value of twelve pence. see the authorities above. —

4 Blac. 241. Fost 73. 2 Hale 529 1 Haw 151.

Public Wrongs.

4 Blac. 242.
1 Haw 147.

Open and violent larceny from the person, or robbery is "the felonious and forcible taking from another, of goods or money of any value by violence" or putting him in fear — the value here is immaterial —

1 Haw. 147. 8.
1 Hale. 532.
3 Inst 69.
4 Blac. 242

"Taking from the person". There must be an actual taking — An attempt to rob, is not at common law felony, though it is formerly holden to be so; but it is a high misdemeanor incurring fine & imprisonment.

Haw 148.
4 Blac. 242

It is now made felony by Statute 7 Geo. 2 transportation —

1 Haw 148
1 Hale. 533.
Jak. 613.
Hya. 1015.
Cro Ch. 145.
4 Blac. 242

If one takes the goods of another in his presence by violence and putting him in fear (tho' it be not literally from his person) it is the taking from the person, within the definition — As first putting one in fear, and then taking away his horse which is standing by him — or driving away his cattle, which are in his presence —

1 Haw. 148.

So if having put one in fear, he takes goods from his his servant in his presence; it is without a question a taking from the person. & a forcible taking —

1 Haw 147.
3 Inst 68.

And he, who recieve my money &c. by my delivery, while I am under terror from his assault, is guilty of a taking from my person. — So if putting me in fear, he extorts an oath from me, that I will deliver it and I do it in pursuance of the oath —

4 Blac 242
Com R. 478
Hya. 1015.

But a taking which is not directly from the person of the owner, or in his presence is not within this definition — It is clearly no robbery —

If several persons join to rob A. and mipping him, one of them goes from the rest and without

1 Haw. 148. 1 Hale 553. 554. 537.

their knowledge and out of their sight, robs B. and then returns to them, all are guilty; because of the intent to rob, and assist each other in robbing. Sed quære, unless they collected for the purpose of robbing any person, who might fall in their way

4 Blac. 242. 1 Haw 147. 3 Inst 60. 69.

A redelivery, after the taking is complete; ~~and it~~ does not purge the offence of taking; but is still a robbery; for the definition does not require the continuance of the goods in the robber's possession —

4 Blac. 242. 3 Inst 68. 1 Haw. 148

"By violence or putting in fear." The criterion which distinguishes robbery from other larcenies, is this; for otherwise there can be no robbery. —

"Violence" in this case, denotes more than is implied in the mere act of taking; which is violence in ~~mere~~ judgment of law. Thus. there is a violence in picking a pocket — it denotes violence of some kind, offered to the person; but it ought to be such as calculated to excite fear — but actual violence is not necessary; putting in fear is sufficient — as in the case of an oath extorted —

4 Blac 243 Fost 128. 1 Haw 129. Fost 129.

The violence or putting in fear must be previous; or at least, must not be subsequent — as, if one steals privately from a person, and afterwards keeps the thing stolen, by putting him in fear, it is no robbery —

1 Haw. 140. 2 Roll. 154. 245. 1 Hale 534. 535.

The violence &c must be professedly for the purpose of obtaining the money &c taken; for where a servant finding one drunk, and under pretence of carrying him home drags him along, kicks him &c and privately takes away his money, it is no robbery — the beating &c was not for the purpose of exciting fear. tis nothing in the case —

1 Haw 148 OB. 1782. pa. 197.

Public Wrongs—

4 Blac. 243.
1 Haw 149.
Fost 128.

As to the putting in fear, 'tis sufficient that so much force or threatning by word or gesture, is used, as might naturally create apprehension or danger —

1 Haw 149.
Ld. Cth. 1784. pa. 296.
& 1786. pa. 342.
Fost. 129.

And such threatening as is likely, according to common experience, to excite an apprehension of danger, to ones character or good name; is a sufficient putting in fear; (as threatning to accuse one of an unnatural crime — (this is so holden by all the judges in Eng and) —

4 Blac. 243
1 Haw. 149.
1 Hale 533.

Buying with a drawn sword is robbery; for putting in fear — So, forcibly extorting money from another under pretence of a sale — Whether compelling any market-man, or any huggler, by violence &c to sell his goods for the full value is robbery — is dubious. it seems not, for there is no felonious intent —

1 Haw. 149.
4 Blac. 243.

4 Blac 243
1 Haw 149

"Putting in fear," is not necessary to be stated in the indictment. "by violence &c" is sufficient — When the offence is laid to have been committed, "by putting in fear," it is not necessary to prove actual fear — such circumstances of violence or such threats &c as are calculated to excite fear are sufficient — As, that one knocked another down without warning & rifled him while senseless — it being robbery though no actual fear was sustained —

1 Haw 149.
1 Hale 504.

A claim of property in the goods taken, without any colour of right, is no excuse —

Dy. 224.
Hawk. 150.
149.
Ray. 275.

Whether openly taking goods from the person without violence, or putting in fear, is felony of any kind is doubtful — According to Hawkins it is not. as snatching a hat from ones head & running away with it —

Public Wrongs.

2 Roll. 154. Hob 43. 70. Sid. 254.

The last case does not strictly fall under either of the divisions of larceny from the person

Of The Punishment. — This is punished as a capital felony, (whatever be the value of the goods) but at Com. Law. clergyable. (tho' now by Stat. it is ousted. 23 Hen 8 — 1 Haw. 149. 150 4 Blac. 240. & 3 & 4 W & M. It is therefore (in England) death, both in the principals & accessories before the fact —

(In Ton. it is like burglary. Newgate — & If with personal abuse, force or violence, or so armed as to excite terror, Newgate for life —)

Of Forgery.

4 Blac. 247. 1 Haw. 335. 210. 2 Bac. 566 —

Forgery is a crimen falsi; & at Common law. is "the fraudulent making or altering of a writing, to the prejudice of an another's right" —

1 Roll. 68. 1 Haw 335. 338. 2 Bac. 568. 1 Roll. 65. 76. 3 Mod 66. 1 Vran. 69 Ray. 81. 2 Mod. 760. 1 Haw 210. Ib. 335. 338 — 2 Bac. 566. 1 Roll. 68. 1 Sid. 16. 155 and 3 Ed 51. Cro 2. 853. 3 Bulst. 265. 1 Haw. 338.

Records, & other authentic writings of a public nature as parish registers &c Deeds & wills, are subjects of forgery at common law. (There is no decision at com. law as to wills; but at any rate, it is now forgery by Stat. 2 Geo. 2 —)

But according to a great number of opinions, the making or altering of any private writings of a nature inferior to deeds and wills, is not at Com law, forgery — (as Notes, Orders, Bills of Exchange &c. They are not called specialties — and according to some, there is no punishment in these cases —

2 Ld Ray. 1461. 1 Vran. 747. Bernard 10. 2 Ld Ray 737.

Since Hawkins' time, however, it has been holden, that the "fraudulent making, &c. of any writing by which another may be prejudiced, is forgery, at com. law —

Public Wrongs.

Term R. 666 — Fraudulent making &c of a bill of exchange on paper unstamped, is considered forgery. see the case TR. —

By a variety of English Statutes, however, almost every species of writing is made the subject of forgery — (The Stat Con. on this subject includes all private writings — by the words in it, "any other writing" —)

1 Haw. 336. 2 Bac. 567. 2 Mod. 759. Nov. 101. 3 Inst. 170. Dy. 208. 2 Hob. 60. 1 Hawk. 337. — Not only actually making a false instrument, & subscribing anothers name to it, and fraudulently altering one, already executed, is forgery; but, many other acts are also forgery — As, if one who is employed to write a will for a sick man, falsely inserts legacies not directed to be inserted — Now, here the name is not forged neither is the writing altered, after being executed. (Suppose in this case, the will is never executed — it is not forgery as I conceive; because there would be no complete instrument.) —

2 Bac. 567. 1 Hawk. 336. 3 Mod. 66. 3 Inst. 171. — So writing an obligation, or lease &c, over ones name, found at the bottom of a letter. &c. here, clearly the the name is not forged —

3 Haw 336 3 Mo. 66. 2 Bac. 567 8 Mod. 192 12 Ph. 493. 496. — And if one inserts in an indictment, the name of one against whom it was not found. this is properly an alteration within the definition —

1 Haw 336. 2 Bac. 567. 2 Mod. 619. 11 Co. 27. a. 3 Inst 169. — Fraudulently altering a deed in a material part, is forgery — As altering the manor of B. for the manor of A. £100. into £10. — (But in 3 Inst. 169. the contrary is held, because it is not made in the name of another than the true signer. and neither hand nor seal is counterfeited — (But this certainly wrong. for it is clearly within the definition —

Public Wrongs.—

1 Haw. 210. If one, having found a bill of exchange, forges on it an indorsement, to get it discounted, it is a proper forgery at common Law see 2 Ld Ray. 1461.—

1 Haw. 336. 1 Mod 635. 799. Nov. 101. 2 Bac. 566. Dy. 288. a. One may be guilty of forgery by making & executing a deed, himself, in his own name — As if one, having given a deed of Black acre to A. and afterwards grants the same to B. and ante dates the deed. This is fraud, and to the prejudice of A. — — —

1 Hawk. 257. But he who writes an instrument in another's name, and signs, and seals it for the same person and in his presence, and by his direction is not guilty of forgery; it is in law the act of the latter.

1 Haw 337. Esp. 224. 1 Nov. 99. 1 Mod. 655. Sal. 375. 2 Bac 567 Wo. 26. The making &c. must be fraudulent — Therefore, if an obligee changes the word "pounds," in stead of "pence," it is not forgery; it is injurious to himself only. But here the security is avoided by it —

1 Haw 337 2 Bac. 567. Yet, it is said, even this alteration if made with a view to gain the advantage to himself, or to prejudice a third person, would be forgery — Thus; the obligee might be bound to assign the obligation to a bona fide creditor of his own creating &c.

Regularly a non feasance cannot amount to a forgery though the intent be fraudulent. As, by omitting a legacy in a will &c. forgery being a positive act. But it is said if the omission of one bequest materially alters the limitation of another, it may be forgery — As, omitting an estate for life to one, whereby the devise of an intended reversion to another, is made to take effect in presenti — for here the omission does

Public Wrongs.

1 Haw 337. 2 Hol. 760. Voy. 101. does operate in favour of the latter as a positive devise for the life of the former —

Ld Ray 737. 1461. 1462. Str. 747. It is not necessary that any one be actually prejudiced; but it is sufficient that from the nature of act, some one might be prejudiced — As where the obligation is never enforced — Burnard 10. —

3 Bur 1469. It is not necessary to forgery, that the writing should be published — for it is punishable, though the party keeps it in his desk; the intent being clear. — Suppose an alteration in a part immaterial & if by the obligee, it is regularly injurious to himself only; 11 Coke. 27. a if by a stranger, or the obligor, it can be of no effect. but yet, if it was by the obligee, it might in some cases prejudice another — As another might have the beneficial interest — So if by an obligor, or stranger; it might be injurious to the obligee; because the author or the ~~obligation~~ alteration might not be known — Quere. would it then be forgery in either case if the intent was fraudulent? —

Bac Law. 579. Long 287. 362 1 East. 180. On a prosecution for forgery, a "writing" purporting to such an instrument the defendant cannot be convicted, if it does not, on the face of it, purport, to be the instrument described — In the indictment the forged instrument must be set out in words & figures —

The Punishment — At common law it is fine and imprisonment and pillory — By a variety of English Statutes it is more severely punished; Fost. 116. or in most cases it is punished with death — see Blackstone 247. 250 —

Public Wrongs.

Of Perjury.

4 Blac. 137. 3 Inst. 164. 1 Haw. 318. 3 Bac. 814.

"Perjury is a crime of swearing wilfully absolutely & falsely, in a matter material to the issue or point in question, under a lawful oath, administered in some judicial proceeding" —

5 Mod. 350. 10 H. 513. 3 Inst. 165. 4 Blac. 137.

It must be a wilful, false swearing, with some degree of deliberation; and this ought to appear clearly, for it is not perjury, if through surprise, or by a mistake or thro' inadvertancy 1 Haw. 319. 2 Bac. 814.

Hob. 62. 1 Haw. 319. 4 Blac. 137. Cro El. 165. 169. Noy. 128. 2 Roll. 257. 3 Bac. 814.

The oath must be taken in some juridical proceeding, i.e. before some officer having authority to administer an oath, or in court, or in some proceedings relative to a civil suit, or crim. prosecution

5 M. d. 348. 1 Roll. 41. 2 Ib. 257. 12 Co. J. 91. 3 Bac. 814. 4 Blac. 137 1 Haw 320. 1 Hent 369. 370. Contra —

It is immaterial, whether the court of record or not. As in a Chancery, Ecclesiastical court in Eng.d or in any other lawful court. 1 Haw. 319. Cro E. 907. 185. 609. Any voluntary, or extrajudicial oath is not within the law. — As an oath before a magistrate on making a bargain that the property is the vendors &c. Gilb. 658.

2 Roll. 257. 4 B. & C. 72. 3 Inst 166.

But perjury may be assigned on an affidavit or deposition, tho' the affidavit &c. be never improved or used in any way by the party taking 7 Term R 315 —

1 Haw 320 2 R. 11 257. 3 Inst. 166. 3 Bac. 814.

Perjury is confined to such public oaths as affirm or deny some matter of fact. — ~~it does not~~ ~~judicial~~ predicable of promissory oaths; as oaths of office, but the violation of the latter is a misdemeanor — see 1 Hawkins 325. 4 Com. 147 —

Public Wrongs.

1 Haw 320. Cro C. 146. Gilb. L. E. 660.

But perjury is predicable of any false oath, when material to the point in question, in judicial proceedings — tho' not affecting the principal judgment — Thus. respecting the ability of one, offered in bail &c. and so, upon any interlocutory question —

1 Roll. Ab. 379. Cro El. 609. 135. Noy 128. 5 Mod. 348. 2 Keb. 452. 3 Bac. 815. 4 Com. 146. 7.

A party when allowed his oath in juridicall proceedings may commit perjury, as well as an indifferent person or witness — Thus, the Defd. in his answer in Chancery — the party's affidavit in Eng upon collateral points in courts of law. — 1 Haw. 322.

1 Haw. 322.

But a juror who violates his oath in finding a verdict is not guilty of perjury — for he is not sworn to testify the truth — but to decide upon the testimony of others — his oath is promissory —

3 Pa. m. 294 1 Haw. 322. 2 Roll. Ab. 3 Inst. 166. 3 Mod. 222. 6 J. R. 637. 4 Com. 147.

It is said not to be material, whether the matter sworn to, be true or not, in fact; if the witness did not know it to be true, he is perjured — For he is to swear to those facts only, which are within his knowledge

1 Haw. 323 3 Inst. 166. 3 Bac. 815. 4 Com 147. RL. 377.

The swearing must be absolute and direct — for swearing under such qualifications as "I think" or "I believe" &c. cannot be perjury. 1 Hu. if the witness not think so &c. for it has the weight of common testimony — May not the law be thus evaded?) Gilb. L. E. 660 —

1 Haw 323. 3 Bac. 815 1 Sid. 274. 4 Com. 147. Hob. 53. Sal. 514. Cro J. 500. 1 Roll. 78 Ray 258.

The swearing must be to a material point — An impertinent or idle testimony cannot be perjury. As. if the question be whether A. was compos &c or not. and the witness gives the history of a journey to see A. and more presents some of the accidents of the journey — this not material — Mod. 345-8.

Public Wrongs.

2 Haw 223. 325. Cro 2. 212. 1 Co. 101. a 2 Lev 196. 3 Bac. 815.

But if the false evidence tho' circumstantial and not directly applying to the issue tends to aggravate, or extenuate damages it may be perjury —

Ld Ray 258. 9 4 Com. 382 2 Roll. 36.

So it is said, if the immaterial and false part of the evidence, is likely to induce the jury to give a man ready credit to the substantial part — but this point is not well settled. see 1 Haw 324 —

4 Com 147. 1 Haw 323.

Swearing that one beat another, with a sword, wherin truth it was with a staff; is not sufficiently material to constitute a perjury — the beating is only material: (Que. may not the kind of instrument, tend to aggravate the charge —?) —

1 Haw 325 Ld Ray. 250. 9. Gilb L. E. 660.

It need not appear in what degree the false evidence was material, sufficient it be circumstantially so. and much less necessary that the evidence be decisive of the issue. for it may be very material and yet not sufficient to govern the finding &c. —

1 Haw 323. Cro. 1784. Keg. 305

It is always incumbent on the prosecutor to prove the evidence material —

1 Haw. 325. 2 Lev 211. 3 Sa. 280. 3 Bac. 815

It is not necessary that the false evidence should have been credited by the Jurors — nor, of course that any person should have been actually injured — this crime does not consist in a damage done to an individual. but in abusing public justice —

1 Haw 325. 1 Mod 195. Cro. 1784.

To convict for perjury, two witnesses, at least, are necessary. otherwise, there is oath against oath —

Haw. 325. Ld Ray. 316.

It was holden in Eng.d till lately, that the person injured by the perjury, could not testify against the offender on a public prosecution —

Public Wrongs—

3 Term R. 27. 308. 2 Ld. Ray. 60. 4 Ld. 20. 589. Burr. 2253. Ter. R. 98. 1 Haw. 325. 4 Blac. 138. 1 Roll. Ab. 57. 79. Yelv. 72. 3 Mod. 122. Cro. J. 58

This was overruled in Eng.d but still prevails in Con.t — Two persons cannot join in a prosecution for perjury, the offence not joint, see Strange 623. 870. 921 see also 4 Burr 246. 2 Burr 25. Cowp. 492 Bull. N.P. 5.

(Subornation of perjury is the offence of procuring another to commit perjury — but the perjury must be actually committed or it is no subornation —

4 Blac. 138. 3 Inst. 163.

Perjury and subornation of perjury is punished at com. law variously — anciently with death — afterwards banishment or cutting out of the tongue then a forfeiture of goods — now by fine and imprisonment, and inability to give evidence, other penalties are superadded by Stat. 5 Eliz. & 2 Geo 2 —

1 Haw. 325.

Exciting one to commit perjury and its not being actually committed, is punished at Com law. by fine and infamous corporal punishment —

3 Blac. 363. Cowper. 799. Sal. 660. 2 Ther. 279. Raym. 184. Stra. 187.

The consequence of a conviction at Com law. of perjury that the offender cannot ever be a juror — A variance in the indictment, by the omission or addition of a letter, is not material, unless it makes another word — as by misspelling — or leaving out letters —

(Under Stat. Con.t perjury and subornation &c are punished by forfeiture sixty seven dollars — Newgate for six months. disqualified to take an oath in any Court of record —) Perjury in a court of record, or not of record is punishable at common law by fine & imprisonment and inability to give evidence —

(False affirmation of quakers also; in Con.t is considered and punished as perjury —

Public Wrongs.

Of Bail

4 Blac. 296. 2 Sw. 389. 390.

When one is arrested for a crime, and brot before a magistrate - (on charge of a crime not cognizable by him) the latter is to enquire into the facts charged, to discover whether he ought to be holden to trial or not —

4 Blac. 287. Ib. 296. 2 Sw. 390.

But he has no right to examine the prisoner at Common law. - In Eng.d it is authorised by Stat. 2 and 3 Ph. & M. - (In Con.t no statute warrants it) —

4 Blac. 296.

Upon enquiry it appears, that the offence charged has not been committed, or that the charge against the prisoner is wholly groundless; he is to be discharged. Otherwise, he must be committed to prison - or give bail for his appearance -

1 Blac. 297.

Bailing, is delivering one to his sureties, on their giving security for his future appearance &c - And it is regularly given and demanded for all offences, below Felony. whether against common law. or Statute, the offender ought to be bailed, unless prohibited by Statute - (Bail, taken by a sheriff, after commitment in the name in Con.t is holden good (see Dickerson & Kingsbury 6 Cr. 1807)

1 Blac. 297. 2 Inst. 189. 1 Com. 168. 1 Hale 97. 1 Blac. 220

(Common law (according to Blackstone) all felonies were bailable - even treason and murder - (according to others all offences except homicide. so that the accused was admitted to bail in almost any case at any rate — But the Stat. Westm.r 1. 3 Edw. 1 denies bail in treason, and many felonies - and further provisions are made on the subject by Stat. 25 Edw. 3. and 1 & 2. Ph. & Mary) -

Public Wrongs.

Or, when the party has confessed — or is notoriously guilty. And without the facts in Arson, murder &c. the accused is not bailable — But the English Statutes, taking away the power of bailing, in certain cases do not extend to B. R. in Eng. This Court or any one of the judges of it, in vacation may now bail, for any crime; even for murder or treason — They extend only to subordinate, or common bailing officers, as Sheriffs &c —

Comp. 333.
4 Blac. 299.
1 Bac. 219. 223
2 Inst 189.
Fal. 105.
Swan 91.
6 St. 1242.
2 Haw. 175.
4 Bur. 2179.

But the Court of B. R. will not admit to bail in those cases, in which bail is prohibited by Statutes; unless under special circumstances in the party's favour — Or, where the prosecutor has unreasonably delayed the trial — where the evidence appears very weak — Or where the persons life is in danger from confinement, and such like cases. — but in case of illness, it must arise from confinement —

2 Haw. 157. 175.
5 Mod. 454.
5 Palm. 550.
1 Sid. 78.
10 Mod. 334.
Stra. 49. 547.
Holt. 85.
1 Bac. 223.
4 Comp. 333.

After verdict against the defendant, he is not admitted to bail till judgment, unless the prosecutor does consent — (in Con. this rule has often been dispensed with) (In Con. all crimes are bailable except capital — and contempts in open court. Swift. 391.) —

1 East 159.

It is a general rule, that he who judge of the offence may be an offender at Com law, ex officio —

1 Hen. Blac. 270.
2 Haw. 97 fol. and 110 fol. 3 Inc.

If a majistrate &c takes insufficient bail: and the principal does not appear, he is fineable —

4 Blac. 297.
2 Bac. 227.
2 Haw. 142

In Eng. four sureties are generally required in case of felony — two in inferior offences. (In Con. I believe not more than two are required in any case whatever.) —

1 Com. 473.
2 Hale 194.
1 Co. 101.
2 Haw. 141.

Public Wrongs.

1 Com. 473.
2 Haw. 143.
1 Bac. 228.
1 & 6 Mod. 179.

Refusing bail when it ought to be granted — is a misdemeanor at Common law, and as such, is punishable by fine or amercement. — and in this case the party injured has also his action —

2 Haw 142. 206.
1 Hale. 596.
1 Com. 473.
4 Inst. 179.

Granting bail, when not grantable is at Common law, punishable by fine, as a negligent escape — It is also punished, by several English Statutes —

Root. 90.

(It has been decided in Con^t. on a prosecution for a forgery, that the deft. being out on bail, after trial — the verdict could not be recieved, unless he was present in Court. Qu. has not this practice been agt. deffrent?)

Of Costs.

(By the Stat. Con^t. a person charged with, and tried for any crime, tho' acquitted, pays the Costs — provided the prosecution was occasioned by any "unlawful, or blamable conduct" of his — If not thus occasioned, he is dismissed without costs. and then it is paid, (according to old law.) out of the treasury — into which the fine would have gone if he had been amerced.) (and in general, fines are inflicted by the Superior Court. to the State treasury — &c.) But now by Stat. 1792.) Costs arising on public prosecutions in the Courts of Common Pleas — are paid by the State treasury — and those recovered go into the State treasury — When costs arise in any criminal proceeding, and there is no acquittal or conviction, the State pays, if "the crime was cognizable, by the Superior court." Does the new Stat. apply to this case? —

Public Wrongs.

2. if a person cannot be apprehended, or being apprehended, escapes without the officers fault, before he is committed. — the State pays &c. (vt supra) —

3. If the person charged and tried, is liable to pay costs, but is unable, as having not property sufficient — he is bound out in service, to any inhabitant of this State, or the United States — but when it cannot be thus obtained, it is payable out of the State treasury, if tried by the Superior —

When the evidence before a court of enquiry is not sufficient to hold the accused to trial. Cost cannot be taxed against him — Kirb. 262. —

In England no costs are paid on either side when the Crown prosecutes, except in particular cases, by special provision of the Legislature —

7 Term R. 367. Hawk. 2. 125. Comp. 307. —

As to the Law with respect to discharging Juries in criminal cases. See. Fost. C. L. 29. 39. 46. Dal. of Stud. 271 — New York. 2 R. 2 Vol. 100/104. People of the State vs Barnet &c. — 4 Hawk. 459. Hales P. C. 294, 5, 6. — 3 Bac. 568. — Trials Per Pais 200 —

In criminal cases Writs of venire facias de novo have been granted 2 Ray 1584 and even in capital cases. do. 1585 —

Taken by

LECTURES
ON
LAW

II